IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Khaled El-Masri,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	1:05cv1417-TSE-TRJ
	)	
George Tenet, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Plaintiff in this civil suit claims to be an innocent victim of the United States' "extraordinary rendition" program[1] and seeks redress from the former Director of the Central Intelligence Agency (CIA), private corporations allegedly involved in the program, and unknown employees of both the CIA and the private corporations. At issue is whether the assertion of the state secrets privilege by the United States is valid, and, if so, whether this privilege prevents this case from proceeding.

---

[1] The complaint alleges that since the early 1990s the CIA has been operating interrogation centers in countries where the United States believes legal safeguards do not constrain efforts to interrogate suspected terrorists. This practice is commonly known as "extraordinary rendition."

I.

A. Facts[2]

Plaintiff Khaled El-Masri is a German citizen of Lebanese descent. His allegations begin on New Years Eve 2003 when he claims he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonia. Following his abduction, El-Masri alleges the Macedonian authorities imprisoned him in a Skopje hotel room for 23 days, refusing to let him contact a lawyer, a German consular officer, a translator or his wife, and interrogating him continuously about his alleged association with Al Qaeda, an association he consistently denied. After thirteen days of this treatment, El-Masri alleges he commenced a hunger strike to protest his detention, and he did not eat again in Macedonia.

On January 23, 2004, El-Masri claims several men in civilian clothes entered his hotel prison room. They forced El-Masri to make a statement that he had not been mistreated by his captors, and would shortly be flown back to Germany. After his captors videotaped this statement, El-Masri states he was blindfolded and driven to what sounded like an airstrip approximately one hour from Skopje. Still blindfolded, he alleges he was led to a building where he was beaten, stripped of his clothing, and

---

[2] As appropriate when considering a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., the facts recited here are derived from the complaint and assumed true. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (plaintiff's version of facts accepted as true at threshold dismissal stage).

sodomized with a foreign object. He further alleges he was dragged naked to a corner of the room where his captors removed his blindfold only for him to be blinded again by a camera's flash. When he regained his sight, he claims he saw seven or eight men dressed in black and wearing black ski masks. El-Masri contends that these men were members of a CIA "black renditions" team, operating pursuant to unlawful CIA policies at the direction of defendant Tenet. These men, he alleges, dressed him in a diaper, a tracksuit and earmuffs. He claims he was then blindfolded, shackled and dragged to an airplane where his captors injected him with a sedative that rendered him nearly unconscious. In this drugged state, he states he was secured inside the aircraft and thereafter only dimly remembers the airplane landing once and taking off again before finally depositing him in a place that El-Masri knew from the air temperature was not Germany. Indeed, El-Masri was to discover later that he had been flown to Kabul, Afghanistan.[3]

Upon reaching Kabul, El-Masri claims he was again beaten and then placed in a small, cold cell. He contends this prison was a CIA-run facility known as the "Salt Pit," an abandoned brick factory north of the Kabul business district. El-Masri alleges he was

---

[3] In his complaint, El-Masri alleges that documentary evidence supports his recollection. He claims aviation documents show that late on the evening of January 23, 2004 a Boeing business jet owned by defendant Premier Executive Transport Services, Inc. (PETS) and operated by defendant Aero Contractors Limited (ACL) flew from Skopje, Macedonia to Kabul, Afghanistan with a brief stop in Baghdad, Iraq. This documentary evidence is attached to the plaintiff's memorandum of points and authorities in opposition to the United States' motion to dismiss.

detained in the "Salt Pit" for the next four months, during which time he was repeatedly interrogated about his alleged association with terrorists, including September 11 conspirators Mohammed Atta and Ramzi Binalshibh. He points out that although the prison facility was nominally run by Afghans, two of his interrogators identified themselves as Americans. He claims he repeatedly beseeched his captors to contact the German government on his behalf, but these requests were denied.

In March, El-Masri contends he and several other inmates commenced another hunger strike to protest their continued confinement. After 27 days without food, El-Masri states he was brought before two unmasked persons he believes were CIA agents in charge of the "Salt Pit." These men refused to accede to El-Masri's demands to release him, to charge him with a crime, or to allow him to contact a German official. Although the American official denied these requests, El-Masri contends the official conceded to El-Masri that El-Masri's detention was a mistake, but that he could not agree to El-Masri's release without permission from Washington. At this point, El-Masri states he was returned to his cell where he continued his hunger strike. After ten more days without nourishment, El-Masri asserts his captors fed him forcibly by inserting tubes into his nose and his mouth through which they pumped liquid sustenance. Soon thereafter, El-Masri states he was given canned food and books to read. El-Masri alleges that his hunger strike had a deleterious effect on his health; he lost sixty pounds over the course of his detention.

El-Masri contends that the CIA had determined soon after his arrival in Afghanistan that

they were detaining an innocent man. Further, he contends that Tenet knew this fact by April 2004 and that Secretary of State Condoleeza Rice knew by early May that El-Masri was the victim of mistaken identity.[4] Nonetheless, El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon. El-Masri asserts that he remains deeply traumatized by his abduction and treatment during his detention.

B. Proceedings

The complaint in this case was filed on December 6, 2005, naming the following defendants: (1) former Director of the CIA George Tenet, (2) certain unknown agents of the CIA (John Does 1-10) (3) PETS, (4) ACL, (5) Keeler and Tate Management (KTM),[5] (6) and certain unknown employees of the

---

[4] El-Masri also intimates that the German government was aware of his captivity. In addition to his American interrogators, El-Masri describes meeting a German speaker who identified himself only as "Sam." "Sam" asked El-Masri many of the same questions as his American interrogators, but ultimately informed him that he would be released only if he agreed never to discuss what had happened over the last five months.

[5] According to El-Masri, the aircraft used in his transfer from Macedonia to Afghanistan was sold by PETS to KTM on or about November 14, 2004, shortly after reports of the aircraft's involvement in the "extraordinary rendition" program. El-Masri contends that this transfer was fraudulent because it was done to

defendant corporations (John Does 11-20). Tenet is sued in his individual capacity for authorizing the unknown CIA agents' actions with actual or constructive knowledge that such actions were illegal, and John Does 1-10 are sued for their actual participation in El-Masri's treatment. El-Masri sues the American corporations PETS, ACL and KTM, as well as their employees, for their participation in the CIA's "extraordinary rendition" that victimized El-Masri. El-Masri contends that these corporate defendants are liable for authorizing the use of aircraft they owned or operated for the transfer of suspected terrorists to detention facilities despite the corporate defendants' knowledge that the suspected terrorists, including El-Masri, would be detained incommunicado, tortured and subjected to other cruel treatment.

El-Masri asserts three separate causes of action. The first claim is brought against Tenet and the unknown CIA agents pursuant to the cause of action recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of El-Masri's Fifth Amendment right to due process. Specifically, El-Masri contends that Tenet and John Does 1-10 violated the Due Process Clause's prohibition against anyone acting under color of U.S. law (1) to subject any person held in U.S. custody to treatment that "shocks the conscience," or (2) to deprive any person of liberty in the absence of legal process. El-Masri's second cause of action is brought

---

avoid potential liability for PETS' acts. El-Masri contends that KTM is the successor to PETS, carrying on the same business and operations and utilizing the same personnel and assets as PETS.

against all defendants pursuant to the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged arbitrary detention.[6] Likewise, El-Masri's final cause of action is brought pursuant to the ATS for each defendant's violation of international legal norms prohibiting cruel, inhuman, or degrading treatment.

On March 8, 2006, the United States filed a statement of interest and a formal claim of the state secrets privilege. In support of its formal claim of privilege the United States submitted both an unclassified and a classified *ex parte* declaration of the Director of the CIA (DCI). Thereafter, on March 13, 2006, the United States moved to intervene in the suit pursuant to Rule 24(a), Fed.R.Civ.P. in order to protect its interests in preserving its state secrets. The motion was granted on March 21, 2006. *El-Masri v. Tenet*, Case No. 1:05cv1417 (E.D. Va. March 21, 2006). Concurrent with the motion to intervene, the United States moved for dismissal or for summary judgment on the ground that maintenance of the suit would invariably lead to disclosure of its state secrets. The parties presented oral argument on this motion on May 12, 2006.

---

[6] Codified at 28 U.S.C. § 1350, the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004), has interpreted this statute as providing district courts jurisdiction over civil suits brought by aliens for violations of a limited set of well-recognized norms of international law. *Id.* at 724. The Supreme Court did not identify precisely which well-recognized norms of international law are actionable under the ATS.

II.

The United States' dismissal motion and the plaintiff's opposition raise important threshold issues, the resolution of which requires a two step analysis. First, it is necessary to determine whether the United States' assertion of the state secrets privilege is valid in this case. If not, the inquiry is over and the United States' dismissal motion must be denied. On the other hand, if the assertion of the privilege is valid, then the second step in the analysis requires determining whether dismissal is required or whether the case may nonetheless proceed in some fashion that adequately safeguards any state secrets.

A.

Determining whether the state secrets privilege has been validly asserted requires an understanding of the nature and purpose of the privilege and of who may assert it. The state secrets privilege is an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch. *See United States v. Reynolds*, 345 U.S. 1 (1953). As such, it must be formally asserted by the head of the Executive Branch agency with control over the state secrets at issue, and then only after that person has personally considered the matter. *See id.* If validly asserted the state secrets privilege permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983). More particularly, "the various harms, against which protection is sought by invocation of the privilege, include impairment of the

nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *In re Under Seal,* 945 F.2d 1285, 1287 n. 2 (4th Cir. 1991) (quoting *Ellsberg v. Mitchell,* 709 F.2d 51, 57 (D.C. Cir. 1983)); *see also Sterling v. Tenet,* 416 F.3d 338, 346 (4th Cir. 2005). Given the vitally important purposes it serves, it is clear that while the state secrets privilege is commonly referred to as "evidentiary" in nature, it is in fact a privilege of the highest dignity and significance.

As noted, the privilege belongs solely to the Executive Branch and must be formally asserted by the head of the Executive Branch agency with responsibility for, and control over, the state secrets involved. Once it is determined that the appropriate officer has invoked the privilege, the next step in the judicial inquiry into the validity of the assertion is to determine whether the information for which the privilege is claimed qualifies as a state secret. Importantly, courts must not blindly accept the Executive Branch's assertion to this effect, but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege. *Reynolds,* 345 U.S. at 10. This determination requires a court to consider whether "a responsive answer . . . or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Sterling,* 416 F.3d at 343 (quoting *Reynolds,* 345 U.S. at 9). In other words, this part of the inquiry focuses on whether the United States has made an adequate showing that disclosure of claimed privileged material would injure national security.

How searching the judicial inquiry must be depends on the particular circumstances of the case, for it is well-settled that the depth of a court's inquiry increases relative to the adverse party's need for the information the government seeks to protect. *Reynolds,* 345 U.S. at 11; *Sterling,* 416 F.3d at 343. If the information is peripheral to the adverse party's claims, the court's inquiry need not be as searching as it must be in cases where the claimed state secrets are at the core of the suit. In those cases where the claimed state secrets are at the core of the suit and the operation of the privilege may defeat valid claims, courts must carefully scrutinize the assertion of the privilege lest it be used by the government to shield "material not strictly necessary to prevent injury to national security." *Ellsberg,* 709 F.2d at 58. But, in undertaking this inquiry, courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security.[7] Accordingly, the judiciary must accept the executive branch's assertion of the privilege whenever its independent inquiry discloses a *"reasonable danger* that compulsion of the evidence will expose

---

[7] *See United States v. Nixon,* 418 U.S. 683, 710 (1974) (claims of privilege for military or diplomatic secrets "traditionally shown the utmost deference."); *see also C. & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10 (emphasis added). Importantly, once the court is satisfied that any disclosure of the putative secrets "*might have a deleterious effect on national security*, 'the claim of the privilege will be accepted without requiring further disclosure.'" *Id.* (quoting *Reynolds*, 345 U.S. at 9).

Finally, it is important to note that, unlike other privileges, the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake.[8] Thus, the adverse party's need for privileged information affects only the depth of the judicial inquiry into the validity of the assertion and not the strength of the privilege itself, for "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11.

Given these governing principles, there is no doubt that the state secrets privilege is validly asserted here. To begin with, the privilege has been formally asserted by the appropriate Executive Branch official, the DCI, who has done so by submitting an *ex parte* classified declaration labeled "JUDGE'S EYES ONLY," and also an unclassified

---

[8] *See In re Under Seal*, 945 F.2d 1285, 1288 (4th Cir. 1991) ("the privilege is absolute when properly invoked"); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) ("[S]ecrets of state-matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation-are absolutely privileged from disclosure in the courts.").

declaration for the public record. The latter document states in general terms that damage to the national security could result if the defendants in this case were required to admit or deny El-Masri's allegations. The former is a detailed explanation of the facts and reasons underlying the assertion of the privilege. It is, of course, inappropriate to reveal here the substance of the DCI's classified *ex parte* declaration, for to do so would compromise "the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. It is enough to note here that the substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security. This conclusion finds firm support in the details disclosed in the DCI's classified *ex* parte declaration.

Plaintiff's argument that government officials' public affirmation of the existence of a rendition program[9] undercuts the claim of privilege misses the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods employed in these renditions, or the persons,

---

[9] *See* Declaration of Stephen Macpherson Watt in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Watt Decl.") Exh. A.

companies or governments involved.[10] Nor is the government's assertion of the privilege here intended to protect from disclosure this general information. Instead, the government seeks to protect from disclosure the operational details of the extraordinary rendition program, and these details are validly claimed as state secrets. Accordingly, El-Masri's argument that generalized public admissions somehow undercut the government's right to protect the specific details of the "extraordinary rendition" program are unavailing.

Nor is the strength of the government's privilege somehow diminished by either El-Masri's complaint or the numerous media, government or other reports discussing renditions, often relying largely on El-Masri's allegations.[11] It is self-evident that a private party's allegations purporting to reveal the conduct of the United States' intelligence services overseas are entirely different from the official admission or denial of those allegations. Furthermore, neither the United States' claim of privilege, nor a judicial acceptance of that claim is tantamount to an admission that El-Masri's factual allegations are true. The applicability of the state secrets privilege is wholly independent of the truth or falsity of the complaint's allegations. While a public

---

[10] This distinction between the general and the particular is exemplified by Secretary of State Rice's public comments concerning El-Masri's claims in which she affirmed the existence of the program but declined to comment on the specific facts alleged by El-Masri. *See* Watt Decl. Exh. B. Although not revealing any details about the program, she did say in response to a question about El-Masri's allegations that "when and if mistakes are made, we work very hard to rectify them." *Id.*

[11] *See generally id.*

admission of the alleged facts would obviously reveal sensitive means and methods of the country's intelligence operations, a denial of the alleged facts would also be damaging, as it may raise an inference of veracity in those cases where the government does not deny similarly sensitive allegations but asserts the state secrets privilege instead. For this reason, the CIA has appropriately adopted the policy of neither admitting nor denying allegations regarding the means, methods, persons, entities or countries used in its foreign intelligence operations. In light of this sensible policy, and on the basis of the DCI's public and classified *ex parte* declarations, the Court finds the United States' privilege is validly asserted in this case.

B.

If a court finds that the state secrets privilege has been validly asserted, it must then determine whether the case must be dismissed to prevent public disclosure of those secrets, or whether special procedural mechanisms may be adequate to prevent disclosure of the state secrets. Resolution of this issue will depend on the centrality of the privileged material to the claims or defenses asserted by either party. As the Fourth Circuit has recently put it, "when the very subject of the litigation is itself a state secret," and where there is "no way [the] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case." *Sterling*, 416 F.3d at 347-48 (quoting *Fitzgerald v. Penthouse Int'l., Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985)) (internal quotations omitted). Thus, while it is well-settled that "dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard

privileged material," it is equally well-settled that "where the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy." *Id.* at 348 (internal quotations and citations omitted). In sum, the question is whether El-Masri's claims could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege.

In the instant case, this question is easily answered in the negative. To succeed on his claims, El-Masri would have to prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program.[12] As noted above, any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument. *See* Rule 8(b), Fed.R.Civ.P. ("A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.").

---

[12] For purposes of the present analysis it is appropriate to assume that El-Masri has stated a cognizable claim; the strength or weakness of his legal claims is immaterial to the resolution of the state secrets privilege dismissal motion. It is nonetheless worth noting that El-Masri's legal claims are novel and might well be vulnerable to dismissal pursuant to Rule 12(b)(6), Fed.R.Civ.P., quite apart from the application of the state secrets privilege. *See generally* Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib-Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U.L.Rev. 371 (2005).

These threshold answers alone would reveal considerable detail about the CIA's highly classified overseas programs and operations.

Finally, the fact that any answer to the complaint would potentially disclose information protected by the privilege refutes El-Masri's argument that special procedures short of dismissal would be adequate to protect the government's validly asserted privilege. To be sure, special procedures, such as clearing defense counsel for access to classified information and the application of the Classified Information Procedures Act (CIPA), 18 U.S.C.App. 3, could be, and indeed have been, used effectively in appropriate circumstances in other cases. These are not appropriate circumstances. Such procedures are plainly ineffective where, as here, the entire aim of the suit is to prove the existence of state secrets. As the Fourth Circuit recognized in *Sterling,* where "the whole object of the suit and of the discovery is to establish a fact that is a state secret" special procedures are inadequate. 416 F.3d at 348. Precisely this is the case here. Further, even assuming some mechanism might be used to avoid disclosure of state secrets in the answer, it is clear that the use of special procedures during discovery and trial would be wholly inadequate to preserve the United States' privilege. The Fourth Circuit also addressed this point in *Sterling* where it noted that:

> Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial-or even *in camera*-is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst,

> that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

Sterling, 416 F.3d 338. Thus, while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets. The United States' motion to dismiss must therefore be granted.

C.

The United States' dismissal motion also argues that the recently reaffirmed so-called *Totten* bar renders this case non-justiciable. *See Tenet v. Doe*, 544 U.S. 1 (2005). This argument is problematic in certain respects, but in the end need not be reached.

The *Totten* bar is quite distinct from the state secrets privilege; it is not a privilege or a rule of evidence; it is instead a rule of non-justiciability that deprives courts of their ability to hear "suits against the Government based on covert espionage agreements" even in the absence of a formal claim of privilege. *Id.* at 1233. It is properly invoked only in those cases "where success depends upon the existence of [a] secret espionage relationship with the government," or where the government cannot openly "admit or deny [a] fact that [is] central to the suit." *Id.* at 1236-37. In *Totten*, the Supreme Court forbade the suit of a self-proclaimed Civil War secret agent attempting to enforce the secret espionage agreement

he claimed he had negotiated with President Lincoln on the ground that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *See Totten v. United States*, 92 U.S. 105, 107 (1876). *See also Weinberger v. Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. 139, 146-47 (1981) (holding that whether the Navy had complied with the National Environmental Policy Act (NEPA) with respect to its storage of nuclear materials was "beyond judicial scrutiny"). In *Tenet*, the Supreme Court applied the *Totten* bar to a suit brought by former Soviet double agents seeking to enforce their agreement with the CIA, but made clear that the bar was not limited to contract actions, but applies whenever a party's "success depends upon the existence of [a] secret espionage relationship with the government." *Tenet*, 125 S. Ct. at 1236.

It is debatable whether the *Totten* bar would apply to the present case. It is true that El-Masri's allegations here concern the existence of several "secret espionage relationships" between the United States and both certain foreign governments and the corporate defendants, but it is also true that El-Masri himself was not a party to any of these secret espionage agreements or relationships. There is, therefore, some doubt whether *Totten* speaks to the circumstances at bar. In any event, because the valid assertion of the state secrets privilege presents an adequate and independent ground for dismissal of this case, it is unnecessary to reach and decide the applicability of the *Totten* bar to the facts of this case.

D.

It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity of his factual allegations; they may be true or false, in whole or in part. Further, it is also important that nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.

Finally, it is worth noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.

Accordingly, and for the reasons stated from the bench,

It is hereby **ORDERED** that the United

States' claim of the state secrets privilege is **VALID.**

It is further **ORDERED** that given the application of the privilege to this case, the United States' motion to dismiss must be, and hereby is, **GRANTED.**

The Clerk is directed to send a copy of this Order to all counsel of record and to place this matter among the ended causes.

Alexandria, Virginia
May 12, 2006

s/ T.S. Ellis, III
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KHALED EL-MASRI Plaintiff-Appellant, v. GEORGE TENET, et al. Defendants-Appellees, UNITED STATES OF AMERICA Intervenor-Appellee.	Case No. 06-1667

Appeal from the United States District Court
for the Eastern District of Virginia
T.S. Ellis, III, District Judge.
(1:05-cv-01417-TSE)

Argued: November 28, 2006

Decided: March 2, 2007

Before KING, SHEDD, and DUNCAN,
Circuit Judges

OPINION

KING, Circuit Judge:

Khaled El-Masri appeals from the dismissal of his civil action against former Director of Central Intelligence George Tenet, three corporate

defendants, ten unnamed employees of the Central Intelligence Agency (the "CIA"), and ten unnamed employees of the defendant corporations.[13] In his Complaint in the Eastern District of Virginia, El-Masri alleged that the defendants were involved in a CIA operation in which he was detained and interrogated in violation of his rights under the Constitution and international law. The United States intervened as a defendant in the district court, asserting that El-Masri's civil action could not proceed because it posed an unreasonable risk that privileged state secrets would be disclosed. By its Order of May 12, 2006, the district court agreed with the position of the United States and dismissed El-Masri's Complaint. *See El-Masri v. Tenet*, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006) (the "Order"). On appeal, El-Masri contends that the district court misapplied the state secrets doctrine and erred in dismissing his Complaint. As explained below, we affirm.

I.

A.

On December 6, 2005, El-Masri, a German citizen of Lebanese descent, filed his Complaint in this case, alleging, in substance, as follows: on

---

[13] The corporate defendants named in El-Masri's Complaint are Premier Executive Transport Services, Inc., which the Complaint describes as doing business in Massachusetts; Keeler and Tate Management LLC, described as doing business in Nevada; and Aero Contractors Limited, described as doing business in North Carolina. *See* Complaint ¶¶ 9-11. The Complaint is found at J.A. 9-34. (Citations herein to "J.A. ----" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

December 31, 2003, while traveling in Macedonia, he was detained by Macedonian law enforcement officials; after twenty-three days in Macedonian custody, he was handed over to CIA operatives, who flew him to a CIA-operated detention facility near Kabul, Afghanistan; he was held in this CIA facility until May 28, 2004, when he was transported to Albania and released in a remote area; and Albanian officials then picked him up and took him to an airport in Tirana, Albania, from which he traveled to his home in Germany. The Complaint asserted that El-Masri had not only been held against his will, but had also been mistreated in a number of other ways during his detention, including being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government. El-Masri alleged that his detention and interrogation were

> carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet known as "extraordinary rendition": the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws.

Complaint ¶ 3.

According to the Complaint, the corporate defendants provided the CIA with an aircraft and crew to transport El-Masri to Afghanistan, pursuant to an agreement with Director Tenet, and they either

knew or reasonably should have known that "Mr. El-Masri would be subjected to prolonged arbitrary detention, torture and cruel, inhuman, or degrading treatment in violation of federal and international laws during his transport to Afghanistan and while he was detained and interrogated there." Complaint ¶ 61. El-Masri also alleges that CIA officials "believed early on that they had the wrong person," and that Director Tenet was notified in April 2004 that "the CIA had detained the wrong person" in El-Masri. *Id.* ¶ 43.

The Complaint alleged three separate causes of action. The first claim was against Director Tenet and the unknown CIA employees, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) for violations of El-Masri's Fifth Amendment right to due process. Specifically, El-Masri contends that Tenet and the defendant CIA employees contravened the Due Process Clause's prohibition against subjecting anyone held in United States custody to treatment that shocks the conscience or depriving a person of liberty in the absence of legal process. El-Masri's second cause of action was initiated pursuant to the Alien Tort Statute (the "ATS"), and alleged that each of the defendants had contravened the international legal norm against prolonged arbitrary detention. The third cause of action was also asserted under the ATS, and maintained that each defendant had violated international legal norms prohibiting cruel, inhuman, or degrading treatment.

On March 8, 2006, the United States filed a Statement of Interest in the underlying proceedings, pursuant to 28 U.S.C. § 517, and interposed a claim

of the state secrets privilege.[14] The then Director of the CIA, Porter Goss, submitted two sworn declarations to the district court in support of the state secrets privilege claim. The first declaration was unclassified, and explained in general terms the reasons for the United States' assertion of privilege. The other declaration was classified; it detailed the information that the United States sought to protect, explained why further court proceedings would unreasonably risk that information's disclosure, and spelled out why such disclosure would be detrimental to the national security (the "Classified Declaration"). Along with its Statement of Interest, the United States filed a motion to stay the district court proceedings pending resolution of its privilege claim; the next day, March 9, 2006, the court granted the requested stay. On March 13, 2006, the United States formally moved to intervene as a defendant in the district court proceedings. Contemporaneous with seeking to intervene as a defendant, the United States moved to dismiss the Complaint, contending that its interposition of the state secrets privilege precluded the litigation of El-Masri's causes of action.

El-Masri responded that the state secrets doctrine did not necessitate dismissal of his Complaint, primarily because CIA rendition operations, including El-Masri's alleged rendition, had been widely discussed in public forums. In support of this contention, Steven Macpherson Watt, a human rights adviser to the American Civil Liberties Union, filed a sworn declaration in the

---

[14] Pursuant to 28 U.S.C. § 517, "any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

district court, dated April 7, 2006, in which he asserted that United States officials - including Secretary of State Condoleezza Rice, White House Press Secretary Scott McClellan, and Directors Tenet and Goss - had publicly acknowledged that the United States had conducted renditions.[15] Watt also observed that international human rights organizations had issued statements on various United States rendition operations, including El-Masri's alleged rendition, and that at least one such release had described the use of privately owned aircraft in the renditions of El-Masri and others. Additionally, according to Watt, the European Parliament and the Council of Europe had commenced investigations into possible European cooperation in United States renditions, and similar inquiries were pending in eighteen European countries.

Watt further asserted that "[m]edia reports on the rendition program generally, and Mr. El-Masri's rendition specifically, are too numerous to assemble." Watt Declaration ¶ 26. According to Watt, these media reports revealed the existence of secret CIA detention facilities where some rendition subjects were held, as well as the United States' "modus operandi" for conducting renditions: "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away." *Id.* ¶ 26(vi). And, Watt represented, the news media had documented some of the details of El-Masri's alleged rendition, including the underlying "decision-making process" and the roles of the German and Macedonian governments. *Id.* ¶ 26(viii).

---

[15] The Watt Declaration is found in the Joint Appendix at J.A. 191-210.

On May 12, 2006, after receiving the parties' memoranda and declarations, and after oral argument of the matter, the district court concluded that the claim of the state secrets privilege was valid, and that, "given the application of the privilege to this case, the United States' motion to dismiss must be . . . granted." *See* Order, 437 F. Supp. 2d at 541. El-Masri has appealed from the Order and corresponding judgment of dismissal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

B.

We review de novo a district court's "legal determinations involving state secrets," including its decision to grant dismissal of a complaint on state secrets grounds. *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005).

C.

In the period after the district court's dismissal of El-Masri's Complaint, his alleged rendition - and the rendition operations of the United States generally - have remained subjects of public discussion. In El-Masri's view, two additions to the body of public information on these topics are especially significant in this appeal. First, on June 7, 2006, the Council of Europe released a draft report on alleged United States renditions and detentions involving the Council's member countries. This report concluded that El-Masri's account of his rendition and confinement was substantially accurate. Second, on September 6, 2006, in a White House address, President Bush publicly disclosed the existence of a CIA program in which suspected terrorists are

detained and interrogated at locations outside the United States. The President declined, however, to reveal any of this CIA program's operational details, including the locations or other circumstances of its detainees' confinement.

II.

El-Masri maintains on appeal that the district court misapplied the state secrets doctrine in dismissing his Complaint without requiring any responsive pleadings from the defendants or permitting any discovery to be conducted. Importantly, El-Masri does not contend that the state secrets privilege has no role in these proceedings. To the contrary, he acknowledges that at least some information important to his claims is likely to be privileged, and thus beyond his reach. But he challenges the court's determination that state secrets are so central to this matter that any attempt at further litigation would threaten their disclosure. As explained below, we conclude that the district court correctly assessed the centrality of state secrets in this dispute. We therefore affirm its Order and the dismissal of El-Masri's Complaint.

A.

1.

Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). *Reynolds*, the Supreme Court's leading

decision on the state secrets privilege, established the doctrine in its modern form. There, an Air Force B-29 bomber had crashed during testing of secret electronic equipment, killing three civilian observers who were on board. Their widows sued the United States under the Federal Tort Claims Act, and they sought discovery of certain Air Force documents relating to the crash. The Air Force refused to disclose the documents and filed a formal "Claim of Privilege," contending that the plane had been on "a highly secret mission of the Air Force," and that disclosure of the requested materials would "seriously hamper[] national security, flying safety and the development of highly technical and secret military equipment." *Id.* at 4-5.

The Court sustained the Air Force's refusal to disclose the documents sought by the plaintiffs, concluding that the officials involved had properly invoked the "privilege against revealing military secrets." 345 U.S. at 6-7. This state secrets privilege, the Court observed, was "well established in the law of evidence." *Id.* The Court relied in part on Greenleaf's classic evidence treatise, which traced the recognition of a privilege for state secrets to the 1807 treason trial of Aaron Burr. *See* I Simon Greenleaf & John Henry Wigmore, *A Treatise on the Law of Evidence* § 251 n.5 (16th ed. 1899); *United States v. Burr*, 25 F. Cas. 30, 37 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692D) (observing that, in appropriate circumstances, government may refuse to disclose confidential state matters in judicial proceedings). The *Reynolds* Court also reviewed a long line of decisions, both American and English, that had recognized and refined a privilege for state secrets. These included *Totten v. United States*, where, in 1875, the Supreme Court affirmed the

dismissal of an action for breach of a secret espionage contract, concluding that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. 105, 107 (1875).

Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets. *See* 345 U.S. at 6. In *United States v. Nixon,* the Court further articulated the doctrine's constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns "areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. 683, 710 (1974). The Nixon Court went on to recognize that, to the extent an executive claim of privilege "relates to the effective discharge of a President's powers, it is constitutionally based." *Id.* at 711. Significantly, the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs. The Court accordingly has indicated that the judiciary's role as a check on presidential action in foreign affairs is limited. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (recognizing judiciary's "customary policy of deference to the President in matters of foreign affairs"); *Chi. & S. Air Lines, Inc. v. Waterman S.S.*

Corp., 333 U.S. 103, 111 (1948) (prescribing limited judicial role in foreign policy matters, especially those involving "information properly held secret"). Moreover, both the Supreme Court and this Court have recognized that the Executive's constitutional mandate encompasses the authority to protect national security information. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (observing that "authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief"); *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and the other activities of the [CIA], including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces."). The state secrets privilege that the United States has interposed in this civil proceeding thus has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.

2.

A court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis. At the outset, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. Finally, if the subject information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

a.

The procedural requirements for invoking the state secrets privilege are set forth in *Reynolds*, which derived them largely from prior decisions on the subject. First, the state secrets privilege must be asserted by the United States. *See* 345 U.S. at 7, 73. It "belongs to the Government and . . . can neither be claimed nor waived by a private party." *Id.* Second, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter." *Id.* at 7-8, 73. Third, the department head's formal privilege claim may be made only "after actual personal consideration by that officer." *Id.* at 8. *Reynolds* emphasized that the state secrets privilege "is not to be lightly invoked," and the foregoing constraints on its assertion give practical effect to that principle. *Id.* at 7.

b.

After a court has confirmed that the *Reynolds* procedural prerequisites are satisfied, it must determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure. This inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security. The *Reynolds* Court recognized this tension, observing that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" - no matter how great the interest in national security - but that the President's ability to preserve state secrets likewise cannot be placed entirely at the mercy of the courts. 345 U.S. at 9-10. Moreover, a court evaluating a claim of privilege must "do so without forcing a disclosure of the very thing the privilege is designed to protect."

The *Reynolds* Court balanced those concerns by leaving the judiciary firmly in control of deciding whether an executive assertion of the state secrets privilege is valid, but subject to a standard mandating restraint in the exercise of its authority. A court is obliged to honor the Executive's assertion of the privilege if it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. In assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the "utmost deference" to the responsibilities of the executive branch. *Nixon*, 418 U.S. at 710. Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information. In the related context of confidentiality classification decisions, we have observed that "[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information," and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its

proper context." *Id.* In the same vein, in those situations where the state secrets privilege has been invoked because disclosure risks impairing our foreign relations, the President's assessment of the diplomatic situation is entitled to great weight.

The Executive bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met. A court considering the Executive's assertion of the state secrets privilege, however, must take care not to "forc[e] a disclosure of the very thing the privilege is designed to protect" by demanding more information than is necessary. *Reynolds*, 345 U.S. at 8. Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the Executive's burden. *See, e.g., Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) (relying on declarations of CIA Director); *Reynolds,* 345 U.S. at 5 (relying on Claim of Privilege by Secretary of Air Force and affidavit of Air Force Judge Advocate General). In some situations, a court may conduct an in camera examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled. *See Sterling*, 416 F.3d at 345. The degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it. *See Reynolds*, 345 U.S. at 11. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted...." *Id.* On the other hand, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* Indeed, in certain circumstances a court may conclude that an explanation by the

Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. *See id.* at 9. In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand. *See id.*

After information has been determined to be privileged under the state secrets doctrine, it is absolutely protected from disclosure - even for the purpose of in camera examination by the court. On this point, *Reynolds* could not be more specific: "When . . . the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10. Moreover, no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure; a court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely. *See id.* at 11.

c.

The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if " 'the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,' dismissal is the proper remedy." *Sterling*, 416 F.3d at 348 (quoting *DTM Research, LLC v. AT & T Corp.*, 245 F.3d 327, 334 (4th Cir.2001)). The Supreme Court has

recognized that some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked. *See Totten*, 92 U.S. at 107; *Reynolds*, 345 U.S. at 11 n. 26. Although *Totten* has come to primarily represent a somewhat narrower principle - a categorical bar on actions to enforce secret contracts for espionage - it rested, as we have already observed, on the proposition that a cause cannot be maintained if its trial would inevitably lead to the disclosure of privileged information. *See* 92 U.S. at 107. And in *Reynolds,* while concluding that dismissal was unnecessary because the privileged information was peripheral to the plaintiffs' action, the Court made clear that where state secrets form the very subject matter of a court proceeding, as in *Totten,* dismissal at the pleading stage - "without ever reaching the question of evidence" - is appropriate. *See* 345 U.S. at 11 n. 26. In a recent decision unanimously reaffirming *Totten's* validity, the Supreme Court approvingly quoted *Reynolds's* discussion of *Totten* as a matter in which dismissal on the pleadings was appropriate because the very subject matter of the action was a state secret. *See Tenet v. Doe*, 544 U.S. 1, 9 (2005).

Our own decisions applying the state secrets privilege have also recognized that, in certain proceedings, the unavailability of privileged state secrets as evidence will necessarily lead to dismissal. In *Farnsworth Cannon, Inc. v. Grimes*, an action alleging tortious interference with a classified contract to perform services for the Navy, our en banc Court affirmed the district court's dismissal on state secrets grounds. *See* 635 F.2d 268 (4th Cir. 1980). We reasoned that privileged secrets were so central to the dispute that "[i]n an attempt to make out a prima facie case during an actual trial, the plaintiff and its

lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit." *Id.* at 281. "Such probing in open court," we concluded, "would inevitably be revealing," and dismissal was therefore warranted. *Id.*

In *Fitzgerald v. Penthouse International, Ltd.*, in 1985, we affirmed the district court's dismissal, under the state secrets doctrine, of an action alleging that a magazine article on the Navy's classified marine mammal program had libelously accused the plaintiff of espionage. *See* 776 F.2d 1236, 1237 - 38 (4th Cir. 1985). There, the Secretary of the Navy had filed a public declaration asserting that the plaintiff's plan to call witnesses with knowledge of the Navy's classified program risked the disclosure of military secrets, since those witnesses could be questioned about the secret information to which they were privy. *See id.* at 1242. In addition, the Secretary filed a separate, classified declaration that elaborated on his reasons for asserting the state secrets privilege in the case. *See id.* at 1243 n.9. From all the circumstances, we concluded that "there was simply no way this particular case could be tried without compromising sensitive military secrets," and ruled that the district court had not erred in dismissing it. *Id.* at 1243.

More recently, in our 2005 *Sterling* decision, we affirmed the dismissal of a Title VII action initiated by an African-American CIA officer alleging unlawful discriminatory practices by CIA management. *See* 416 F.3d at 341. We concluded that state secrets were so central to that proceeding that it could not be litigated given the Executive's invocation of the privilege. *Id.* at 346-48. The evidence in the dispute would have consisted primarily of documents and testimony regarding the

assignments and performance evaluations of CIA operatives, and many of the necessary witnesses were individuals whose very identities were state secrets. *Id.* at 347-48. Indeed, as Judge Wilkinson explained, "the whole object of the suit and of the discovery [was] to establish a fact that is a state secret--namely, the methods and operations of the Central Intelligence Agency." *Id.* at 348 (internal quotation marks and citation omitted). In those circumstances, dismissal was deemed appropriate.

Our sister circuits have likewise recognized that the unavailability of privileged information may, in some instances, necessarily lead to dismissal. *See Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (affirming dismissal, on state secrets grounds, of action alleging that Air Force had unlawfully handled hazardous waste in classified operating area); *Black v. United States*, 62 F.3d 1115, 1118-19 (8th Cir. 1995) (affirming dismissal, on state secrets grounds, of action alleging that executive branch officials had engaged in "campaign of harassment and psychological attacks" against plaintiff); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992) (affirming dismissal, on state secrets grounds, of action alleging manufacturing and design defects in military weapons system); *Halkin v. Helms*, 690 F.2d 977, 981 (D.C. Cir. 1982) (affirming dismissal, on state secrets grounds, of action alleging unlawful CIA surveillance); *cf. Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004) (affirming summary judgment because no defense was available without resort to privileged state secrets).

To summarize, our analysis of the Executive's interposition of the state secrets privilege is governed primarily by two standards. First, evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged. *See Reynolds*, 345 U.S. at 10. Second, a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure. *See Sterling*, 416 F.3d at 348; *see also Reynolds*, 345 U.S. at 11 n. 26; *Totten*, 92 U.S. at 107. With these controlling principles in mind, and being cognizant of the delicate balance to be struck in applying the state secrets doctrine, we proceed to our analysis of El-Masri's contentions.

B.

1.

The question before us is whether the facts of this proceeding satisfy the governing standard for dismissal of an action on state secrets grounds, as the district court ruled.[16] El-Masri essentially accepts the legal framework described above. He acknowledges that the state secrets doctrine protects sensitive military intelligence information from disclosure in court proceedings, and that dismissal at the pleading stage is appropriate if state secrets are so central to a

[16] El-Masri does not dispute that the procedural requirements for asserting the state secrets privilege have been satisfied here.

proceeding that it cannot be litigated without threatening their disclosure. El-Masri contends, however, that the facts that are central to his claim are not state secrets, and that the district court thus erred in dismissing his Complaint.

a.

The heart of El-Masri's appeal is his assertion that the facts essential to his Complaint have largely been made public, either in statements by United States officials or in reports by media outlets and foreign governmental entities. He maintains that the subject of this action is simply "a rendition and its consequences," and that its critical facts - the CIA's operation of a rendition program targeted at terrorism suspects, plus the tactics employed therein - have been so widely discussed that litigation concerning them could do no harm to national security. Appellant's Br. 38. As a result, El-Masri contends that the district court should have allowed his case to move forward with discovery, perhaps with special procedures imposed to protect sensitive information.

El-Masri's contention in that regard, however, misapprehends the nature of our assessment of a dismissal on state secrets grounds. The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the "central facts" and "very subject matter" of an action are those facts that are essential to prosecuting the action or defending against it. El-Masri is therefore incorrect in contending that the central facts of this proceeding are his allegations that

he was detained and interrogated under abusive conditions, or that the CIA conducted the rendition program that has been acknowledged by United States officials. Facts such as those furnish the general terms in which El-Masri has related his story to the press, but advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law. If El-Masri's civil action were to proceed, the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges. To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. With regard to Director Tenet, for example, El-Masri would be obliged to show in detail how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him. With respect to the defendant corporations and their unnamed employees, El-Masri would have to demonstrate the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet v. Doe*. *See Totten v. United States*, 92 U.S. 105, 107 (1875) (establishing absolute bar to enforcement of confidential agreements to conduct espionage, on ground that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"); *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (reaffirming

Totten in unanimous decision). Even marshalling the evidence necessary to make the requisite showings would implicate privileged state secrets, because El-Masri would need to rely on witnesses whose identities, and evidence the very existence of which, must remain confidential in the interest of national security. *See Sterling*, 416 F.3d at 347 ("[T]he very methods by which evidence would be gathered in this case are themselves problematic.").

b.

Furthermore, if El-Masri were somehow able to make out a prima facie case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence. The main avenues of defense available in this matter are to show that El-Masri was not subject to the treatment that he alleges; that, if he was subject to such treatment, the defendants were not involved in it; or that, if they were involved, the nature of their involvement does not give rise to liability. Any of those three showings would require disclosure of information regarding the means and methods by which the CIA gathers intelligence. If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved. Or, if El-Masri was in fact detained as he describes, but the operation was conducted by some governmental entity other than the CIA, or another government entirely, that information would be privileged. Alternatively, if the CIA detained El-Masri, but did so without Director Tenet's active involvement, effective proof thereof would

require a detailed explanation of how CIA operations are supervised. Similarly, although an individual CIA officer might demonstrate his lack of involvement in a given operation by disclosing that he was actually performing some other function at the time in question, establishing his alibi would likely require him to reveal privileged information.

Moreover, proof of the involvement - or lack thereof - of particular CIA officers in a given operation would provide significant information on how the CIA makes its personnel assignments. Similar concerns would attach to evidence produced in defense of the corporate defendants and their unnamed employees. And, like El-Masri's prima facie case, any of the possible defenses suggested above would require the production of witnesses whose identities are confidential and evidence the very existence of which is a state secret. We do not, of course, mean to suggest that any of these hypothetical defenses represents the true state of affairs in this matter, but they illustrate that virtually any conceivable response to El-Masri's allegations would disclose privileged information.

c.

It is clear from precedent that the "central facts" or "very subject matter" of a civil proceeding, for purposes of our dismissal analysis, are those facts necessary to litigate it - not merely to discuss it in general terms. In *Bareford v. General Dynamics Corp.*, several plaintiffs who had been injured or whose decedents had died in the 1987 missile attack on the U.S.S. Stark in the Persian Gulf initiated an action against the manufacturers of the vessel's weapons system, alleging that the system had been

defectively manufactured and designed. *See* 973 F.2d 1138, 1140 (5th Cir. 1992). Those allegations, like El-Masri's, could be set forth without revealing state secrets; the plaintiffs' assertion that a Navy weapons system was defective was not, in itself, detrimental to national security. The facts central to the resolution of the proceeding, however, were whether the weapons system was intended to destroy the missile that struck the Stark and, if so, why it failed. Those critical factual questions could not be answered, the Fifth Circuit concluded, without threatening disclosure of privileged state secrets, and thus dismissal was appropriate. *See id.* at 1143-44.

Similarly, in *Black v. United States*, the plaintiff alleged that, after he had reported suspicious contact with a possible Soviet spy, the CIA, FBI, Department of Defense, and Department of State had subjected him to a "campaign of harassment and psychological attacks." 62 F.3d 1115, 1116 (8th Cir. 1995). Black claimed that employees of those agencies had followed him, subjected him to strange telephone calls, broken into his apartment and rearranged things, broken into his car, and drugged him with a substance that produced terrifying hallucinations. *See id.* at 1116-17. The general subject matter of those allegations, like that of El-Masri's Complaint, could be discussed without revealing state secrets. Yet the Eighth Circuit concluded that dismissal was appropriate because the facts central to the actual litigation of Black's claims - the "identity of the alleged wrongdoers, their relationship to the government, and their contacts with Black" - were privileged. *Id.* at 1118-19.

In *Kasza v. Browner*, the plaintiffs alleged that the Air Force had contravened the Resource

Conservation and Recovery Act in its storage, treatment, and disposal of hazardous waste at a classified operating location near Groom Lake, Nevada. 133 F.3d 1159, 1164 (9th Cir. 1998). Their allegations could be explained without resort to state secrets; the revelation that the Air Force might have unlawfully handled its hazardous waste was not detrimental to national security. But because much of the specific information needed to litigate the plaintiffs' claims was privileged, the Ninth Circuit concluded that the "very subject matter of [the] action is a state secret," and "agree[d] with the district court that [the] action must be dismissed." *Id.* at 1170. Our own recent decision in *Sterling* involved a CIA officer's claim that he had been discriminated against because of his race. *See* 416 F.3d at 341. As in the decisions of our sister circuits discussed above, Sterling's allegations could be stated with no detrimental effect on national security; his assertion that the CIA had engaged in race discrimination compromised no confidential information. Yet we concluded that the very subject matter of his action, the facts central to its litigation, consisted of state secrets, because a judicial resolution of the matter would have required disclosure of how the CIA makes sensitive personnel decisions, and would have involved the production of witnesses whose very participation in a court proceeding would risk exposing privileged information. *See id.* at 347-48. We thus affirmed the dismissal of Sterling's action at the pleading stage. *See id.* at 348- 49.

In light of these decisions, we must reject El-Masri's view that the existence of public reports concerning his alleged rendition (and the CIA's rendition program in general) should have saved his Complaint from dismissal. Even if we assume,

arguendo, that the state secrets privilege does not apply to the information that media outlets have published concerning those topics, dismissal of his Complaint would nonetheless be proper because the public information does not include the facts that are central to litigating his action.[17] Rather, those central facts - the CIA means and methods that form the subject matter of El-Masri's claim - remain state secrets. Consequently, pursuant to the standards that El-Masri has acknowledged as controlling, the district court did not err in dismissing his Complaint at the pleading stage.

2.

El-Masri also contends that, instead of dismissing his Complaint, the district court should have employed some procedure under which state secrets would have been revealed to him, his counsel, and the court, but withheld from the public. Specifically, he suggests that the court ought to have received all the state secrets evidence in camera and under seal, provided his counsel access to it pursuant to a nondisclosure agreement (after arranging for necessary security clearances), and then conducted an in camera trial. We need not dwell long on El-Masri's proposal in this regard, for it is expressly foreclosed by *Reynolds,* the Supreme Court decision that controls this entire field of inquiry. *Reynolds* plainly held that when "the occasion for the privilege is

---

[17] By no means do we endorse El-Masri's theory that publicly reported information concerning his alleged rendition is ineligible for protection under the state secrets doctrine simply because it has been published in the news media. We need not address his contention in that regard, however, because his appeal would fail even if we were to accept it.

appropriate . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10. El-Masri's assertion that the district court erred in not compelling the disclosure of state secrets to him and his lawyers is thus without merit.

C.

In addition to his analysis under the controlling legal principles, El-Masri presents a sharp attack on what he views as the dire constitutional and policy consequences of dismissing his Complaint. He maintains that the district court's ruling, if affirmed, would enable the Executive to unilaterally avoid judicial scrutiny merely by asserting that state secrets are at stake in a given matter. More broadly, he questions the very application of the state secrets doctrine in matters where "egregious executive misconduct" is alleged, contending that, in such circumstances, the courts' "constitutional duty to review executive action" should trump the procedural protections traditionally accorded state secrets. Appellant's Br. 10.

Contrary to El-Masri's assertion, the state secrets doctrine does not represent a surrender of judicial control over access to the courts. As we have explained, it is the court, not the Executive, that determines whether the state secrets privilege has been properly invoked. In order to successfully claim the state secrets privilege, the Executive must satisfy the court that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to remain secret. Similarly, in order to win dismissal of an action on

state secrets grounds, the Executive must persuade the court that state secrets are so central to the action that it cannot be fairly litigated without threatening their disclosure. The state secrets privilege cannot be successfully interposed, nor can it lead to dismissal of an action, based merely on the Executive's assertion that the pertinent standard has been met.

In this matter, the reasons for the United States' claim of the state secrets privilege and its motion to dismiss were explained largely in the Classified Declaration, which sets forth in detail the nature of the information that the Executive seeks to protect and explains why its disclosure would be detrimental to national security. We have reviewed the Classified Declaration, as did the district court, and the extensive information it contains is crucial to our decision in this matter. El-Masri's contention that his Complaint was dismissed based on the Executive's "unilateral assert[ion] of a need for secrecy" is entirely unfounded. It is no doubt frustrating to El-Masri that many of the specific reasons for the dismissal of his Complaint are classified. An inherent feature of the state secrets privilege, however, is that the party against whom it is asserted will often not be privy to the information that the Executive seeks to protect. That El-Masri is unfamiliar with the Classified Declaration's explanation for the privilege claim does not imply, as he would have it, that no such explanation was required, or that the district court's ruling was simply an unthinking ratification of a conclusory demand by the executive branch. We also reject El-Masri's view that we are obliged to jettison procedural restrictions - including the law of privilege - that might impede our ability to act as a check on the Executive. Indeed, El-Masri's position in that regard fundamentally misunderstands the

nature of our relationship to the executive branch. El-Masri envisions a judiciary that possesses a roving writ to ferret out and strike down executive excess. Article III, however, assigns the courts a more modest role: we simply decide cases and controversies. Thus, when an executive officer's liability for official action can be established in a properly conducted judicial proceeding, we will not hesitate to enter judgment accordingly. But we would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us - especially when the challenged action pertains to military or foreign policy. We decline to follow such a course, and thus reject El-Masri's invitation to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line.[18]

D.

As we have observed in the past, the successful interposition of the state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted. *See Sterling*, 416 F.3d at 348 ("We recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear."). That party loses access to evidence that he needs to prosecute his action and, if privileged

---

[18] A group of former diplomats and State Department officials have submitted a brief in this matter as amici curiae. The amici emphasize that it is important, as a matter of foreign policy, to provide a forum for claims of civil and human rights violations. Even if we were to conclude, however, that protecting national security is less important than litigating the merits of El-Masri's claim, we are not at liberty to abrogate the state secrets doctrine on that basis.

state secrets are sufficiently central to the matter, may lose his cause of action altogether. Moreover, a plaintiff suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security. *See id.* ("[T]here can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk."); *Fitzgerald*, 776 F.2d at 1238 n. 3 ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants - through the loss of important evidence or dismissal of a case - in order to protect a greater public value").[19] In view

---

[19] It should be unnecessary for us to point out that the Executive's authority to protect confidential military and intelligence information is much broader in civil matters than in criminal prosecutions. The Supreme Court explained this principle in *Reynolds*, observing:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

345 U.S. at 12. El-Masri's reliance on our decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), in which we required the United States to grant a criminal defendant substantial access to enemy-combatant witnesses whose very identities were highly classified, is thus misplaced.

of these considerations, we recognize the gravity of our conclusion that El-Masri must be denied a judicial forum for his Complaint, and reiterate our past observations that dismissal on state secrets grounds is appropriate only in a narrow category of disputes. *See Sterling*, 416 F.3d at 348; *Fitzgerald*, 776 F.2d at 1241-42. Nonetheless, we think it plain that the matter before us falls squarely within that narrow class, and we are unable to find merit in El-Masri's assertion to the contrary.

III.

Pursuant to the foregoing, we affirm the Order of the district court. *See El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).[20]

AFFIRMED

---

[20] On July 17, 2006, the United States filed a motion for expedited in camera/ex parte review of the Classified Declaration. By Order dated August 19, 2006, we deferred consideration of that motion. We now deny the motion as moot.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Khaled El-Masri,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	1:05cv1417-TSE-TRJ
	)	
George Tenet, *et al.*,	)	
	)	
Defendants.	)	

FORMAL CLAIM OF STATE SECRETS PRIVILEGE BY PORTER J. GOSS, DIRECTOR, CENTRAL INTELLIGENCE AGENCY

I, PORTER J. GOSS, hereby declare and state:

1. I am the Director of the Central Intelligence Agency (CIA) and have served in this capacity since 21 April 2005. I represented the 14th Congressional District of Florida as a Member of the U.S. House of Representatives from 3 January 1989 to 23 September 2004. During that time, I served on the Permanent Select Committee on Intelligence of the U.S. House of Representatives (HPSCI) from February 1995 until August 2004. From February 1997 until the President of the United States announced his intention to nominate me as Director of Central Intelligence (DCI) in September 2004, I served as Chairman of the HPSCI. I was confirmed

by the Senate as DCI on 23 September 2004, was sworn in as DCI on 24 September 2004, and served in that capacity until 21 April 2005, when the Director of National Intelligence was sworn into office. Prior to my service in the U.S. House of Representatives, I served as an officer of the CIA in the Directorate of Plans and Programs, the predecessor to the Directorate of Operations.

2. This declaration is a formal claim of the state secrets privilege. I respectfully request that the Court consider this declaration and, more particularly, my classified declaration discussed below before this case proceeds further. At my request, the Department of Justice (DOJ) is filing a motion for an immediate stay of proceedings in conjunction with the filing of this claim of privilege.

3. I make the following statements based upon my personal knowledge, as well as upon information made available to me in my official capacity.

4. The CIA was established by section 104(a) of the National Security Act of 1947 (Act), as amended, 50 U.S.C. § 403-4. Pursuant to section 104(b) of the Act, 50 U.S.C. § 403-4(b), the function of the CIA is to assist the Director of the CIA (DCIA) in carrying out his assigned responsibilities. Section 104A of the Act, 50 U.S.C. § 403-4a, established the position of DCIA, whose duties and responsibilities include serving as head of the CIA and collecting information through human sources and by other appropriate means, correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence, providing overall direction for coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to

undertake such collection, and performing such other functions and duties related to intelligence affecting the national security as the President, or the DNI, may direct. A more particularized statement of the authorities of the DCIA and the CIA is set forth in sections 1.5 and 1.8 of Executive Order 12333.[21]

5. Under the direction of the DNI pursuant to section 102A(i) of the Act, 50 U.S.C. § 403-1(i), and in accordance with section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g, and sections 1.3(a)(5) and 1.5(h) of Executive Order 12333, I additionally am responsible for protecting CIA sources and methods from unauthorized disclosure.

6. Through the exercise of my official duties, I have been advised of this litigation. I understand that the plaintiff alleges that he was detained by officials of the Government of Macedonia; that those officials handed him over to CIA officials; that those CIA officials transported him to Afghanistan; that Afghan and CIA officials detained and interrogated him; that the conditions of his confinement inhumane and his interrogation was coercive; and that after several months he was released in Albania. I am further advised that plaintiff seeks money damages in his lawsuit from former DCI George J. Tenet and three corporate defendants. I also understand that the complaint refers to unnamed individuals who are said to be employees of the CIA or of the corporate defendants, and who the plaintiff states he will try to identify and name as additional defendants.

7. Central to this case is the allegation that the CIA conducted a clandestine foreign intelligence

---

[21] Executive Order 12333, as amended, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C.A. § 401 note at 21 (Supp. 2005), and as amended by Executive Order 13284, 68 Fed. Reg. 4,077 (Jan. 28, 2003).

activity. By their very nature, clandestine intelligence activities are not acknowledged by the United States. When there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations. There is a pragmatic reason why this is necessary, that is, to protect classified intelligence sources and methods from unauthorized disclosure and thereby avoid damage to the national security and our nation's conduct of foreign affairs, a position which I understand my predecessors have taken since the CIA's inception and one which also reflects my personal judgment.

8. Confirming the existence of an alleged clandestine intelligence activity would reveal the very classified information sought to be protected from disclosure. The United States does not, however, have the luxury of denying unfounded allegations of clandestine intelligence activities without serious adverse consequence. The denial of CIA involvement may, by itself, provide the informed intelligence analyst useful information about the CIA's capabilities and the scope and thrust of CIA activities. Even where that is not the case, the United States cannot simply deny the existence of such activities where none exist. If that were the policy, the United States' failure to deny such activities in other circumstances would be tantamount to an admission of such clandestine activities in these other circumstances. Therefore, the United States and current and former CIA officers, such as Director Tenet, must take the consistent position of refusing to confirm or deny allegations relating to unacknowledged intelligence activities.

9. With these considerations in mind, I hereby submit this declaration to formally assert a claim of state secrets privilege. I make this claim of state

secrets privilege in my capacity as the head of the CIA, after personal consideration of the matter. In view of the allegations of CIA involvement, parties in this case have a special incentive to probe the CIA's foreign intelligence interests, authorities, and methods generally, and prefer seek information and evidence to establish or refute claims and defenses. The information that underlies my judgment that special procedures are not adequate to protect these sensitive matters cannot be described on the public record and, accordingly, is included in a separate, classified declaration.

10. In connection with my formal assertion of the state secrets privilege, I have considered the extent to which the bases for my assertion could be filed on the public record. After careful consideration, I have determined that no further information regarding the bases for my claim of privilege can be disclosed on the public record without revealing the very information I seek to protect. The full scope of the information protected by the claim of privilege is itself privileged from disclosure. Accordingly, my description of the scope of information protected by the privilege and the bases for my determination are contained in my classified declaration, which is submitted for this Court's *in camera, ex parte* review as a part of this claim of privilege. I have asked DOJ to seek an immediate stay of these proceedings to permit the Court the opportunity to consider my assertion of state secrets privilege before the defendants are required to respond to the complaint or any other proceedings occur in this case.

11. I have requested government attorneys to seek dismissal of this case in view of this claim of state secrets privilege. I recognize that dismissal is an extreme form of relief. Nevertheless, I have asked

DOJ to seek dismissal of this case because, after consulting with CIA and DOJ officials, I have determined that there are no adequate means to allow this case to proceed while protecting the national security interests addressed in my separate classified declaration.

12. My classified declaration will be delivered to a DOJ Security Officer who will assist in delivery and storage as the Court may require. In this regard, it is my understanding that the Classified Information Procedures Act (CIPA) does not govern this civil proceeding, and the DOJ Security Officer will not perform the additional responsibilities as a Court Security Officer under the Chief Justice's CIPA guidelines.

13. In consideration of my responsibility as DCIA to protect CIA activities, sources, and methods, I have determined that neither plaintiff nor his attorneys possess the need-to-know required to access the classified information described in this declaration. Section 4.1 of Executive Order 12958 provides that "[a] person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or an agency head's designee;
(2) the person has signed an approved nondisclosure agreement; and
(3) the person has a need-to-know the information."

Section 6.1(z) defines "need-to-know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function." I understand that one or more

of the attorneys representing the plaintiff may have been granted limited access to certain classified national security information in connection with their representation of detainees who have brought petitions for writs of habeas corpus based upon their detention by the U.S. military at the U.S. Naval Station Guantanamo Bay, Cuba. The Executive Branch's decision to grant such attorneys limited access to certain classified information directly relating to particular petitioners did not displace the DCIA's obligation to protect intelligence sources and methods from unauthorized disclosure. The substance of the information disclosed to petitioner's counsel in those proceedings, while classified, related only to the detainees on whose behalf the attorneys are appearing.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of March, 2006.

s/Porter J. Goss
Director
Central Intelligence Agency

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Khaled El-Masri,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	1:05cv1417-TSE-TRJ
	)	
George Tenet, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF KHALED EL-MASRI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I, Khaled El-Masri, of Senden, Germany under penalty of perjury under the laws of the United States of America, declare as follows, pursuant to 28 U.S.C. § 1746:

1. I was born in Kuwait on June 29, 1963. Both of my parents are Lebanese. I fled Lebanon in 1985 during the civil war and sought asylum in Germany. Before my asylum application was processed I married my first wife, a German citizen. We lived together for ten years, and were married for seven.

2. In 1995, I renounced my Lebanese citizenship, acquired by virtue of the nationality of my parents, and took up German citizenship. After my first

marriage ended in divorce, I re-married in 1996. My second wife is Lebanese. Together we have four young children, ages three, five, seven, and eight years old, and a baby of 7 months.

3. I trained as a carpenter when I first came to Germany. I then began working as a truck driver and subsequently as a car salesman. Around late 2003 and early 2004, I was made redundant from the car dealership. Since then I have been continuously unemployed and dependent on unemployment assistance.

4. In the last few months of 2003, my wife and I had been experiencing marital problems. These problems were made worse by our living conditions. At this point I was unemployed and was living together with my wife and four young children in a one-room apartment. By December of that year, things had gotten so bad that I felt I just had to leave home for a while to get my head together.

5. I decided to travel to Macedonia. ADAC (a German automobile club, similar to AAA in the United States, I understand) informed me that the cost of living there was inexpensive and that hotel rooms were easy and cheap to come by. I made some initial inquiries with a bus company in Ulm that runs direct connections between Ulm and Skopje, Macedonia.

6. On December 30, 2003, I purchased a round-trip bus ticket from Ulm to Skopje. When I purchased the ticket I had no set plans as to how long I was going to stay there, but I planned on remaining for at least a week before returning home again.

7. The bus left Ulm as scheduled on December 30. We traveled without incident through Germany, Austria, Slovenia, Croatia, and Serbia.

8. Around 3 p.m. on December 31, 2003, the bus arrived at the border between Serbia and Macedonia. As with all other border crossings we

made during the trip, at the check point the bus driver collected all the passengers' passports, mine included, to take to the border police for examination. After our papers were checked, everyone, except me, had their passport returned to them. The bus driver approached me and asked me to get off the bus and meet with the border official. The official asked me a few routine questions. First, he asked where exactly I was going to stay in Macedonia. I replied that I intended to find a hotel once I arrived, and that I had no specific one in mind. He then asked me about the purpose of my stay in Macedonia. I said I was on a tourist trip and had planned to stay for about a week. He told me that as soon as I arrived in Skopje, I should go and see the local police. As I did not speak any Macedonian, a fellow traveler translated for me and for the border official. The translator was tall, slim, and appeared to me to me in his mid to late forties. After these few questions the official instructed me to return to the bus. The bus driver stayed with him for a brief moment before returning to the bus.

9. The bus then drove on towards Skopje. After about 3 kilometers or so, I asked the bus driver if he could return my passport. He told me that he didn't have it and that he thought it must still be with the border officials. The driver turned the bus around and drove back to the border, where I got down off the bus and asked the border official for my passport. The official said that there was a problem with my passport, and resolving it might take some time. He suggested that I remain behind and let the bus continue on. He said that after we had resolved the passport issue, he would drop me off at a hotel in Skopje. The bus drove on without me. I had to then hang around waiting until about 6 p.m.

10. At this time I was taken to a narrow room,

about eight meters from the border station. The room had a door and a big glass window facing the street where cars drove by. In the room there was a table, a desk, and a chair. I sat down on the chair with my back to the glass window. The official did not allow me to turn around. He also told me to put every item I carried with me on the table. Afterwards he searched everything thoroughly. Once he had completed the search, a young man appeared. He was about 1.75 m tall and looked to be in his early 30s.

11. After an hour-long interrogation, another man turned up. He was a little bigger and also appeared to be around 30 years old. He started a second interrogation, mentioning Islamic organizations and groups and asking whether I knew any of them. I said that I had heard of most of them. He then asked if I had anything to do with any of them. I replied that I had no involvement or even contact with any of them. He continued to question me about Ulm, asking me if there were any mosques in the area near where I lived, how many people attended their services, what nationalities they were, and if I had ever invited someone to Islamic activities at the Mosque or if someone had ever invited me to them. I answered no to all these questions. I was asked if there were any other activities in mosques apart from Friday services, and if I knew of any non-Muslims that had converted to Islam. He offered me alcohol, presumably to test whether I drank alcohol. I declined. He asked me if I prayed or fasted. I replied, "sometimes."

12. The interrogation ended around 10 p.m. By this stage, some of the officers had gotten drunk; in less than 2 hours, the New Year would begin.

13. I was eventually taken out of the office and led on to the road leading towards Serbia. I saw three vehicles there, all without license plates. Two of

them were VW Golfs: one red, one black. The third car was also black but I cannot remember the make. It was very dark and the fog was thick. The streets and the border station were deserted. My escorts were all dressed in plain clothes and were armed with guns. On our way, we saw a police barricade. We were allowed to pass quickly through it without stopping when my escort turned on a blue signal light.

14. In Skopje I was taken to a hotel. I subsequently discovered the name of the hotel: The Skopski Merak. The hotel has a website: http://www.skopskimerak.com.mk/, which I have looked at.

15. My escorts quickly walked me inside the hotel, and over to the elevator, situated a few meters away on the left side of the entrance. The elevator was very small. It could fit only two people at a time. One of my escorts and I took the elevator. The rest of the men took the stairs.

16. The hotel building had four or five floors. We exited on the top floor and walked into the room located opposite the elevator. Immediately on the left side of the entrance to the room was the bathroom. It had a window, approximately eighty by forty cm, and a Jacuzzi. Between the sink and the Jacuzzi was the toilet. On the right side of the room was a double bed next to a large window with a view toward the inside of the hotel. Opposite the entrance there was a large table with a computer and an internet connection. To the left of it was a television mounted to the ceiling. There was a second window with a view onto the slightly damaged chimney of a tall building. Behind this building was another building and to the left, there was a view of a mountain with a cross visible on its summit. This window was alwa,s locked and covered by heavy blue curtains; between this window and the bed stood a small table with four chairs.

17. From the hotel website photographs, I can identify the actual room where I was held. From another, I even recognize one of the waiters who served me food during my detention there.

18. After entering the hotel room, three of my escorts remained with me. They locked the door. I asked them why they didn't leave. They said that they were going to be staying with me even when I was sleeping. I thought they just wanted to accompany me to my hotel and then leave me there as they said they would when I was detained at the border. I asked them if I was under arrest and they said that I wasn't, asking me if I saw any handcuffs on my wrists. They carried out another search of all my belongings. After this, three of them began interrogating me again. These interrogations were conducted in English despite the fact that I have only a very basic grasp of the language. The three men asked many questions all at once, speaking at me and firing questions from all sides of the room. The interrogation lasted until at least 3 a.m. the next morning.

19. The men conducted similar such interrogations for the next three days. They observed my every move at all times. Even when I went to the toilet they asked me to leave the door open, although it was located in the same room where I was staying. When I was exhausted and tired of answering their questions and after having been locked in this hotel room all this time, I demanded a translator, as I hardly spoke any English. Then I asked to call the German Embassy, a lawyer, and my family. All my requests were refused. At one point I became so angry that I demanded to be released and attempted to leave the room by force. During this particular incident, we all raised our voices, each of us speaking in our own language. Communication was clearly impossible.

One of the men pulled out his firearm and held it level with my head; the other two placed their hands on their holsters in a threatening manner.

20. The watch was divided between nine men; they changed shift every six hours. On the fifth day, a man with a bag appeared. He had sheets of paper and finger-print ink. He also had a camera and took a few photographs of me: right profile, left profile, and then frontal.

21. After about seven days, another official turned up. He appeared to be of a much higher rank than any of my guards. He looked to be around fifty-five years old. He had a large build and brought an assistant with him. He was very respectful. He asked me about my condition and how the food was. He told me that I could order food from any restaurant if I didn't like the food that was being served. He also asked if the guards had treated me well. I thanked him and said that so far I was fine. He then told me that he wanted to and could end my current situation, and that he had a deal to offer me. I asked him what kind of a deal. He replied that if I admitted that I belonged to the Al-Qaeda organization they would send me back to Germany with a police escort. I refused and he subsequently left.

22. Two or three days later, his assistant showed up again and presented me with a list of allegations. He told me that he was certain that these allegations were true. He added that based on these allegations the case against me was no longer within their control, and that it had been referred to the Macedonian president. He said that the president had made a decision regarding my continued detention.

23. I was surprised by this turn of events and asked again to meet with the German ambassador or any other German authority. He told me that the German government did not want anything to do with

me, and that I was wanted by them as well. One of the specific allegations against me was that my passport did not belong to me, and that I was wanted by both the Egyptian and German governments because I had been seen in Jalalabad, Afghanistan. After presenting me with these allegations, he left.

24. On the thirteenth day after my seizure, I began a hunger strike to protest my situation. A week later, I was told they would soon send me to the airport to fly me back to Germany. I did not eat again for the remaining ten days of detention in Macedonia.

25. At around 8 p.m. on the twenty-third day of my captivity, January 23, 2004, a video recoding was taken of me. I was instructed to state my full name, that I had been treated well, and that I would shortly be flown back to Germany. I was then accompanied out of the hotel. Once outside, two men approached me. They grabbed hold of my arms and a third man then handcuffed and blindfolded me.

26. Before being blindfolded, I saw a white minivan, and in front of it, a black jeep. I also saw many people in plain clothes waiting around. I was placed in the jeep and it drove off. By the manner in which it was being driven, I think that it was following another car.

27. After about half an hour, the vehicle came to a halt. I was taken out of the vehicle and made to sit down on a chair, where I sat for about another one and a half hours. At this point, I heard the voice of the assistant who had come to see me with the high-ranking official. I was told that I would soon be taken into a room for a medical examination before being returned to Germany.

28. As I was led into this room, I felt two people violently grab my arms, one from the right side and the other from the left. They bent both my arms backwards. This violent motion caused me a lot of

pain. I was beaten severely from all sides. I then felt someone else grab my head with both hands so I was unable to move. Others sliced my clothes off. I was left in my underwear. Even this they attempted to take off. I tried to resist at first, shouting out loudly for them to stop, but my efforts were in vain. The pain from the beatings was severe. I was terrified and utterly humiliated. My assailants continued to beat me, and finally they stripped me completely naked and threw me to the ground. My assailants pulled my arms back and I felt a boot in the small of my back. I then felt a stick or some other hard object being forced in my anus. I realized I was being sodomized. Of all the acts these men perpetrated against me, this was the most degrading and shameful. I was then pulled to my feet and pushed into the corner of a room. My feet were tied together, and then, for the first time since the hotel, they took off my blindfold. As soon as it was removed, a very bright flashlight went off and I was temporarily blinded. I believe from the sounds that they had taken photographs of me throughout.

29. When I regained my vision, I saw seven to eight men standing around me, all dressed in black, with hoods and black gloves.

30. I was dressed in a diaper, over which they fitted a dark blue sports suit with short sleeves and legs. I was once again blindfolded, my ears were plugged with cotton, and headphones were placed over my ears. A bag was placed over my head and a belt around my waist. My hands were chained to the belt. They put something hard over my nose. Because of the bag, breathing was getting harder and harder for me. I struggled for breath and began to panic. I pictured myself like the images I had seen in the media of the Muslims that were brought to Guantánamo.

31. They bent me over, forcing my head down, and then hurried with me to a waiting car and then on to a waiting aircraft. They walked so fast that the pain at my joints was getting worse, as the iron of my shackles chaffed against my ankles. When I tried to slow down they almost dislocated my shoulder. In the airplane, I was thrown down onto the floor and my arms and legs were spread-eagled and secured to the sides of the plane.

32. During the flight I received two injections, one in the left arm and one in the right arm, at different times. They put something over my nose. I think it was some kind of anesthesia. It felt like the trip took about four hours, but I don't really remember. However, it appeared to be a much longer trip than one to Germany.

33. I was mostly unconscious for the duration. I think the plane touched down once and took off again. When the plane landed for the final time I was fully conscious, although still a little light-headed. I was taken outside the aircraft. I could feel dry, warm air and knew immediately that the place where the plane had landed couldn't possibly be Europe.

34. I later learned that aviation documents show that a Boeing business jet owned and operated by some of the defendants in this case, then registered by the FAA as N313P, took off from Palma, Majorca, Spain on January 23, 2004, and landed at the Skopje airport at 8:51 p.m. that evening. The jet left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital. I believe I was on that plane. Attached hereto as Exhibit A are true and correct copies of the aircraft logs for January 23, 2004.

35. After being removed from the aircraft, I was thrown down into what felt like the trunk of a vehicle. The vehicle drove for about ten minutes. I was then

dragged out of the trunk and down a flight of stairs. My arms were raised high behind my back. I was marched so quickly that at times my feet hardly touched the ground. They pushed and shoved me against the walls of the building. Finally I was thrown to the ground. They beat me and kicked my head. Someone stepped on my head and neck with his feet, then removed my chains and my blindfold. I heard them leave and the door being pulled hard and locked behind them.

36. After adjusting my eyes to the light, I could see that I was lying in a small, filthy, concrete cell. The walls were covered in crude Arabic, Urdu, and Farsi writing. In place of a bed there was one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. It was cold and dark. Through a small opening near the roof of the cell I could see the red, setting sun. It was only then that I realized that I had been traveling for some 24 hours.

37. Through a small grille on the metal door of the cell I could see a man dressed in Afghan clothes standing in front of the cell. I was very thirsty at this point and called out to the man for some water. The man pointed to a small bottle in the corner of my cell. It was a very old plastic bottle, dirty outside as well as in. The color of the water was greenish-brown. It stank. I could smell the water from the other side of the cell. After I held the bottle, the smell stayed on my hands for quite some time. I was extremely thirsty but when I tried to drink the water, it caused me to vomit. It was impossible for me to drink from this bottle.

38. That night, four masked men in black uniforms came to my cell, dragged me outside, and pushed me into a room close by. The room was bare apart from a table and some chairs. Three men in masks were sitting in the room when we arrived. Two wore the

same uniform as my four escorts, the third was dressed in shirt and jeans.

39. Speaking in Arabic with a Palestinian accent, one of them instructed me to strip naked as a doctor was going to examine me. I undressed, but left on the diaper. I was instructed to remove this as well and complied. I was left standing naked.

40. I was then photographed, and blood and urine samples were taken by one of the masked men. I think he may have been a doctor.

41. The "doctor" wore a tight-fitting mask covering his head and extending down his neck. From his eyes, the grey hair that was visible, and the tone of his voice, he appeared to me to be around 40 or 50 years of age. He was dressed casually in jeans and a blue checked shirt. I complained to him about the unhygienic cell and the filthy water. He told me that the Afghans were responsible for the conditions of my confinement. He then asked whether I preferred Islamic or non-Islamic food. I told him I wanted Islamic food. Later I found out that he had made fun of me for this request since the Afghan food was nothing more than the leftovers of the Afghan guards. All it consisted of was chicken bones and skin.

42. After the examination, which lasted about ten minutes, I dressed and was accompanied back to my cell. I had to search for the bed because the cell was so dark. There was no lighting. I found it almost impossible to sleep because it was so cold and I was in so much pain from being strapped to the unpadded floor of the airplane. I could not sleep on my right or left sides. Only after ten days was I able to sleep on my front or back. My discomfort was made worse by the nighttime cold in Kabul at this time, and I only had one blanket.

43. On the second night, four masked men came to my cell, bound my hands and feet, and dragged me

into the interrogation room again. Seven other men were in the room. All of them were masked and wearing black matching uniforms. One of them yelled at me to come forward. He spoke Arabic with a South Lebanese accent. The man asked if I knew why I had been detained; I said that I did not. He then told me that I was in a land where there were no laws, and that nobody knew I was there.

44. On the desk in front of him was a file. He said that the file contained information about me and was the reason I had been detained in Skopje and flown to Afghanistan. He said that the file contained evidence that I had attended a terrorist training camp here in Afghanistan, that my passport was forged. He interrogated me about these issues and my alleged association with important terrorists like Muhammed Atta, Ramzi Bin Al-Shibh and other alleged extremists based in Germany.

45. I said that I had only heard of these individuals in the media, adding that if they wanted to determine whether I had ever trained in Afghanistan and whether my passport was a fake, all they had to do was speak with the German authorities who would prove that I was a German citizen and that I had never been to Afghanistan. I repeatedly asked him to contact the German government. I also asked why I had been taken to Afghanistan, when I was a German citizen, and had no ties to this country. My interrogator did not answer.

46. In total, I was interrogated on three or four occasions, each time by the same man, and each time at night. In one of these interrogations, I was asked about telephone calls to Sudan. My interrogations were always accompanied by threats, insults, pushing, and shoving. Two of the men who participated in these interrogations identified themselves as Americans. During each interrogation, I demanded

that I meet with a representative of the German government. My demands, however, were ignored.

47. In March, together with several other inmates with whom I had been communicating through the cell walls, I commenced a hunger strike. We refused to eat or drink and demanded to see an American commander or representative to complain and demand our basic human rights. Initially, there was no response to our demands. After six days, I became very weak and felt close to death. I started to drink again, but still refused to eat.

48. On the eighth day, one of the inmates met with an American official and handed him a note detailing some of our demands, including that our captors respect our most basic human rights, afford us access to a court to challenge our continued detention, inform our relatives of our whereabouts, and give us reading materials. None of our demands were met.

49. On March 13, I was interrogated by three unmasked American officials and a psychologist who also functioned as the prison's Arabic interpreter. This interpreter had a Syrian accent. The interrogation focused on my alleged associations with Dr. El-Attar, Dr. Yousif, his son Omar, and Mr. Reda Seyam. I was also asked about people associated with the multicultural center "Multi Kultur Haus" in Ulm and the Islamic Information Center (IIZ) in Ulm.

50. On March 31, after twenty-seven days without food, I noticed people standing outside of the house and I shouted to them. I was taken to an interrogation room. After my hands and feet were shackled, I met with two unmasked Americans. One described himself as the prison director; the other was a more senior official whom some of the other inmates referred to as "the Boss." In addition, the Afghan prison director and the Arabic translator with a Palestinian accent were both present.

51. I was asked why I was on hunger strike. I replied that I was protesting my abduction from Macedonia and my detention in Afghanistan. I said that I was also protesting against my continued detention without charge or trial, their refusal to allow me access to a lawyer or my family or government, and the inhumane conditions of my confinement.

52. The American prison director demanded that I end my hunger strike. I responded that I would not unless I was released, brought before a court, or permitted immediate access to a German government official. The only other circumstance that would bring my hunger strike to an end was death. The American prison director said that I was innocent of any crime, and that he would take that matter up with his superiors in Washington, D.C., but that he could not release me without their authorization. After this conversation I was taken back to my cell, and continued my hunger strike. My health continued to deteriorate on a daily basis. I received no medical treatment despite my repeated requests.

53. From media reports, I understand that shortly after I was abducted and transferred to detention in Afghanistan, senior personnel within the CIA as well as the State Department knew that they had the wrong man and that I was being detained unlawfully. Attached hereto as Exhibit B are true and correct copies of media reports substantiating this fact.

54. By April 8 I was so weak that I was unable to leave my bed, not even to use the toilet. On April 9 some Afghans came to see me and tried to convince me to end my hunger strike, as they had noticed how much my health had deteriorated. By April 10 I had been on hunger strike for exactly thirty-seven days.

55. On the night of April 10, thirty-seven days into my hunger strike, hooded men entered my cell, dragged me from my bed, and bound my hands and

feet. They dragged me into the interrogation room, sat me in a chair, and tied me to it. One of the men then grabbed my head. A tube was stuffed up my nose and some sort of liquid was forced directly into my stomach. After this procedure, I was given some canned food as well as some books to read. I noticed that the food boxes had blue and white labels, and listed sodium and potassium as part of their contents. I could also make out "USA" written on these boxes. I was also weighed at this time. The scale showed that since the time of my initial detention in December 2003, I had lost more than sixty pounds.

56. Around April 8, 2004, I distinctly recall feeling an earth tremor. After my return to Germany, my lawyers obtained records online from the Geological Survey. These records show that on February 14 and April 15, 2004, there were indeed two tremors recorded in the vicinity of Kabul. Attached hereto as Exhibit C is a true and correct copy of these records.

57. Thirty hours after this force-feeding, I became extremely ill and suffered excruciating pain in my stomach. A doctor visited me in my cell in the middle of the night and administered medication on which I could read the name "Cipro." I remained in bed thereafter for several days, during which time my health gradually improved.

58. Around the beginning of May, the Afghan prison director took me to the interrogation room where I met with an American who identified himself as a psychologist as well as a female interpreter. The psychologist told me he had come all the way from Washington, D.C. to check on me and ask me some questions. At the end of our conversation, he promised that I would be released from the facility very soon.

59. Some days later, on May 16, the American prison director, together with a man in military

uniform, arrived. The man in the military uniform spoke German and identified himself only as "Sam." "Sam" was about 180cm tall, slim, and had light brown hair. His skin was very tanned. He wore glasses and a cap. He told me that he wanted to talk honestly with me about everything I knew. I said that I was more than happy to share everything I knew with him, but before I did I wanted to know who from the German government had sent him. Before answering he turned to the two Americans beside him (one was the prison director) and spoke with them in English. I could not understand exactly what they were talking about, but after speaking with the director he told me in German that he could not respond to the specific questions I had raised. I then asked him if anyone in the German government knew I was here. Again he refused to respond. I then asked him if my wife knew where I was. To this, he replied no. I noticed that whenever he spoke he searched for his words. He seemed very nervous while the Americans stood beside him. After my questions, "Sam" began to interrogate me.

60. He asked more or less the same questions that I had previously been asked, in Macedonia and by the Americans as well, regarding my alleged associations with extremists in Neu-Ulm, Germany and people who attended or preached at the multicultural center in Neu-Ulm. In all, the conversation lasted for about two to three hours.

61. From our very first meeting I was convinced "Sam" was a German citizen and from his accent, from the North of the country. At one point he told me that his wife used a "Metro-Card," a particular card for the "Metro" supermarket that is generally used only by self-employed people, and it was clear to me from this conversation that he knew Germany intimately. Following my return home, I identified

"Sam" twice: once on January 1, 2006, from a photograph in the online newspaper "Saar-Echo" (after I was notified of the article by its author, Frank Kruger), and again on February 20, 2006 from a police line-up. His name is Gerhard Lehmann and he is an officer from the German BKA (Bundeskriminalamt). I am ninety percent certain that the "Sam" I met in Afghanistan and the man I identified in this line-up one and half years later are one and the same. Attached hereto as Exhibit D is a true and correct copy of a New York Times article reporting on my identification of "Sam."

62. "Sam" met with me three more times. On May 20, he told me that it might take them another week to assess whether or not I could be released. Upon hearing this I became angry and told him that they kept promising my release and always postponed it. I said that I would begin my hunger strike again the next day.

63. On May 21 I began my second hunger strike. In the evening that same day, the American prison director appeared together with "Sam" and an American doctor. "Sam" asked that I end my hunger strike and assured me that I would be on my way to Germany within the next eight days. He said that they were just clearing the security formalities for my transfer from Afghanistan to Germany. He explained that the flight would not go directly to Germany and that it would take many hours. He asked that I remain calm, not worry, and that I would be home soon.

64. I recall distinctly all of the dates mentioned in this declaration because I dutifully counted them from the first day of my detention. When I didn't have any paper or pencil to record the dates, I scratched the days off on the wall of my cell. Then, when I was issued paper and a pencil I wrote them down. When the other inmates warned me that the guards would

keep any papers in my cell when I left, I committed the dates to memory.

65. On the evening of May 27, the American doctor and the American prison director came to my cell. The doctor examined me. The director then said that I was to be flown back to Germany the next day. He went on to explain some of the details of the transfer from my cell to the airport. The doctor requested that I not eat or drink after that night, as I wasn't going to be permitted to use the bathroom during the flight.

66. The next morning, May 28, the doctor and the American prison director arrived in my cell. I was handcuffed, shackled, and blindfolded before being led outside and put inside a jeep. I was driven for about ten minutes and then taken inside a large empty shipping container. They sat me down in a chair so that I was unable to see out and was forced to face the wall. From this position, I could hear the sound of an approaching aircraft.

67. Shortly thereafter, my blindfold was removed and I was handed the suitcase that had been taken from me in Skopje. I was also given two t-shirts. I removed the clothes I had been wearing and changed into some of the clothes that I had in my suitcase and one of the t-shirts.

68. My hands were cuffed again. My ears were plugged and headphones were placed over my ears. I was blindfolded again and led back to the jeep. We drove a short distance to the waiting airplane. Once inside I was chained to the seat.

69. The plane was much smaller than the one that had flown me from Macedonia. It had leather seats. I wasn't administered any injections before taking off. "Sam" accompanied me. I could also hear American accents around me. Although they were muffled, it sounded to me like there were at least two or three

different people.

70. At one point during the flight, I asked if I could remove the headphones. "Sam" obliged and they remained off for the remainder of the flight.

71. After telling me that there was a new President in Germany, "Sam" explained that we would eventually land in a European country but that it would not be Germany itself. When he told me this, it heightened my persistent fear that I was not going to be flown home, but rather taken to another country and executed. The flight took about six to seven hours.

72. When the plane landed, "Sam" told me that we would part company there and some other people would make sure I got back to Germany safely. I was blindfolded and handcuffed the whole time. I was then bundled out of the plane and placed in the backseat of what I sensed to be a Japanese-made minivan-type vehicle. Specifically, I sensed that it was a Toyota F-model, by the sound it made when it drove over bumps. I had driven an identical model myself when I was back in Germany.

73. I was driven in the car, up and down mountains, on paved and unpaved roads for more than three hours. The vehicle came to a halt and I was aware of the three men in the car getting out, closing the doors and then three men climbing in to the vehicle. All of them had South European/Slavic accents, but said very little.

74. The vehicle proceeded to drive for another three hours, again up and down mountains and on paved and unpaved roads. Eventually, the vehicle was brought to a halt. I was taken out of the car and before my blindfold was removed, one of my captors turned me around. He then removed the blindfold, sliced the cuffs from my wrists, gave me my suitcase and passport, and directed me to walk down a path

without turning back.

75. I heard the car leave and began to walk as instructed. It was dark. No one was around. As I walked I feared that I was about to be shot in the back and left to die.

76. As I came round a corner in the road, I came across three armed men. They immediately asked for my passport. When they saw that my German passport had no Albanian visa, they said I was illegal and asked me what I was doing in Albania without the necessary authorization. I had no idea I was even in Albania. We walked together a short distance until we came upon an old one storey building. The building had an Albanian flag on it.

77. Some time later another man appeared. He seemed to be a superior officer. He went through my bags and asked me what I was doing in Albania. He said that from my appearance (I had grown long hair and a beard) I looked like a terrorist. When I told them the story of my arrest in Macedonia, transport to and imprisonment in Afghanistan, and eventual transport to Albania, they all laughed and said that no one would believe my story. The officer instructed me not to tell my story to anyone.

78. I asked if they could take me to the German Embassy. The officer in charge said that was unnecessary; they would take me to the airport and put me on a flight to Germany.

79. The whole time I was with them, I sensed that they had been expecting me; that our chance encounter on the road was not an accident at all but rather planned. One fact that seems to confirm this for me is that the bread, chips and cheese that I was given to eat during the road trip through Albania were in the same plastic bag that I got when I ate these very snacks at the border station, and they tasted exactly the same.

80. The three men drove me to the Mother Theresa Airport in Tirana. We arrived at around 6 a.m. One of the men took my passport and 320 Euros from my wallet and went in to the airport building. When he returned some fifteen minutes later, he instructed me to go through a door. On the other side, I was met by another man who accompanied me through customs and immigration controls and on to the airplane. Apart from an exit stamp in my passport, I went through these controls without further inspection. Only after the plane was airborne did I finally believe that I was going home.

81. Attached hereto as Exhibit E is a true and correct copy of relevant pages of my passport showing Macedonian entry and exit stamps as well as an exit stamp from Albania.

82. The plane landed at Frankfurt International Airport at 8.45 a.m. on May 29, 2004. I went through customs and immigration controls. By this time, I had lost a great deal of weight, something like sixty pounds, my hair was long and unkempt, and my beard had not been shaved since I arrived in Macedonia. Consequently, I looked nothing like the picture in my passport. The immigration officer questioned whether I was the same man, but after substantiating my identity with other documentation in my possession, he let me through.

83. From Frankfurt I traveled to Neu-Ulm and from there to my home village, Senden. I knew before I entered my house that no one was there and that no one had been there for some time. I went from my home to the Cultural Center in Neu-Ulm where I asked after my wife and children. I was told that my wife and children were all safe and well and that they had all relocated to her family's place in Lebanon. I called my wife and she returned to Germany with our four children one week later. On

July 31, 2005, our fifth child, Sirin was born.

84. On June 3, 2004, I met with my German lawyer Manfred Gnidjic. Initially skeptical of my account of what had happened to me, he asked that I write down a complete version of events and make drawings of the hotel in Macedonia where I had been detained for twenty-three days and the prison in Afghanistan. Attached hereto as Exhibit F are true and correct copies of my statement together with a plan of the hotel in Skopje and the prison in Afghanistan

85. Mr. Gnidjic also requested that I hand over all the items that I had with me in Macedonia and Afghanistan. Among other things, I gave Mr. Gnidjic my passport, which was stamped with entry and exit stamps for Macedonia and an exit stamp for Albania, my boarding pass for the flight from Tirana to Frankfurt, and the two t-shirts which had been given to me in Afghanistan.

86. On June 20, 2005, I met with Steven Watt of the American Civil Liberties Union (ACLU) in Ulm. I retained the ACLU to represent me in legal proceedings in the United States. On December 3, 2005, together with my German lawyer, Mr. Gnidjic, I attempted to travel to the United States to meet with my U.S. lawyers and to attend a press conference.

87. On December 3, 2005, we attempted to enter the United States in Atlanta. Although Mr. Gnidjic was permitted to enter the country, I was denied entry. No reasons were given for my refusal. I was sent back to Germany via France that same day. Attached hereto as Exhibit G is true and correct copy of the denial of entry.

88. On December 8, 2005, the ACLU wrote on my behalf to the U.S. Department of State and Department of Homeland Security seeking an explanation for my denial of entry to this country. Both the State Department and the Department of

Homeland Security responded that should I decide to enter the U.S. on some future occasion, they would facilitate the process. Attached hereto as exhibit H are true and correct copies of this correspondence.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April 2006.

s/Khaled El-Masri

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Khaled El-Masri,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	1:05cv1417-TSE-TRJ
	)	
George Tenet, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF MANFRED GNJIDIC IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I, Manfred Robert Gnjidic, of Ulm, Germany, under penalty of perjury under the laws of the United States of America, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a German citizen and a qualified attorney. I have my own practice, Gnjidic & Aehle, which is based in the city of Ulm. I have been practicing as an attorney in Germany since 1993.

2. Towards the end of May 2004, Mr. Khaled El-Masri made an appointment to meet with me at my office. We agreed that we would meet on June 3, 2004. During our meeting Mr. El-Masri recounted to me the story of what had happened to him in

Macedonia and Afghanistan. The story he narrated during that meeting is by and large identical to the one given by him in his declaration filed herewith.

3. After our first meeting I asked Mr. El-Masri to write down the full version of his story and to provide me with drawings of the hotel room and the prison where he was held in Afghanistan. I also asked that he provide me with all the physical evidence that he had that might substantiate his story. I took some pictures of him at this time. Attached hereto as Exhibit A are true and correct copies of the pictures I took at this time.

4. Mr. El-Masri provided me with his passport, his boarding pass for his flight from Tirana to Frankfurt, two t-shirts that he had been given in Afghanistan, and a number of keys that he had with him for the duration of his detention.

5. Following our meeting, on June 8, 2004, I wrote a letter on behalf of Mr. El-Masri to the German Chancellor and the German Minister for Foreign Affairs.

6. On June 15, 2004, Mr. Bernhardt from the public prosecution office in Memmingen, Germany, contacted me in regards to Mr. El-Masri's case and the allegations I had made on his behalf in my letters of June 8, 2004. Mr. Bernhardt explained that his office had opened an investigation into Mr. El-Masri's allegations and that he would need to interview him.

7. The public prosecution offices are established under the German Judicature Act (Gerichtverfassungsgesetz). Under the German Criminal Procedure Code (Strafprozessordung), the public prosecution office must investigate any suspected criminal offense and thereafter, depending on the findings of that investigation, file criminal proceedings with the court. Under German law, the

public prosecution office is required to ascertain not only incriminating but also exonerating evidence, and is obligated to safeguard and protect all available evidence as well as the source of such evidence. The public prosecution office may request information from any public authority and may conduct any type of investigation that it considers necessary, whether in Germany or overseas. The office conducts its investigation through its own officers, and other agents of the State, including police officers.

8. Officials from the public prosecution office conducted interviews with Mr. El-Masri on June 17 and 18, 2004, December 12 and 20, 2005, and February 20 and 27, 2006.

9. On June 23, 2004, Mr. El-Masri told me that he had been contacted by one of the prisoners with whom he had been incarcerated while in Afghanistan. I contacted one of the police officers who was working with the prosecutor on Mr. El-Masri's case to notify him of this potential witness. For the next several months we discussed the possibility of bringing this witness to Germany for an interview. Unfortunately, the prosecutor did nothing concrete to facilitate the witness' transportation to Germany. Neither Mr. El-Masri nor I have heard anything from him since September 2004.

10. On July 8, 2004, the prosecution file was transferred from the Memmingen office to the office in Munich I.

11. From July, 2004 to date, Mr. Martin Hoffman and Mr. August Stern from the Munich I public prosecution office have been investigating Mr. El-Masri's allegations. Officials from the office conducted a number of interviews with passengers on the bus on which Mr. El-Masri traveled from Ulm to the Serbian/Macedonian border. These interviews essentially confirm Mr. El-Masri's version of what

happened to him at the Serbian/Macedonian border.

12. I provided the prosecutor's office with Mr. El-Masri's passport, the two t-shirts he had been given in Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr. El-Masri had with him while in Macedonia and Afghanistan. The office requested these so that it could conduct forensic examinations on them, including fingerprint and DNA analysis. All these items remain with the prosecutor's office.

13. In addition, the prosecutor's office requested that Mr. El-Masri provide them with a hair sample to allow them to commission a radioactive isotope analysis of the follicles. The test results obtained are consistent with Mr. El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period. Attached hereto as Exhibit B is a true and correct copy of the analysis, together with an English translation.

14. On December 15, 2005, I gave the prosecutor's office a copy of a list of names that a Spanish investigative reporter working for the El Pais newspaper had given me. The reporter contended that the list contained the names of the individuals who had been on board the aircraft which had been used to transport Mr. El-Masri from Macedonia to Afghanistan and who were directly implicated in his rendition. The reporter said that he had compiled the list from a criminal investigation that had been conducted by a Spanish Prosecutor into the alleged use of the Palma, Majorca airport by aircraft used in renditions by U.S. corporations and personnel, including Mr. El-Masri's.

15. Sometime late in 2005 or early in 2006, the prosecution file became the joint responsibility of Mr. Hofmann, Mr. August Stern and a third prosecutor, all of whom are chief prosecutors (Oberstaatsanwalt)

with the Munich I public prosecution office. The file is still open and the investigation ongoing. Mr. Stern has indicated that he would be willing to consider providing this court with any of the evidence he has collected to date should this court deem it necessary.

16. On March 10, 2006 the opposition parties in the German Parliament agreed on an inquiry into, inter alia, Mr. El-Masri's alleged abduction and detention in Macedonia and Afghanistan. The mandate of the parliamentary committee will be to investigate CIA activities in Germany (including the alleged abduction and detention of El-Masri) and the alleged assistance given by German intelligence agencies to U.S. forces in Iraq. The inquiry began on March 31, 2006 and will meet in public session. A full report of the findings will be issued following its conclusion. Attached hereto as Exhibit D is a true and correct copy of the mandate of the German parliamentary inquiry.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April 2006.

s/Manfred Gnjidic

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Khaled El-Masri,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	1:05cv1417-TSE-TRJ
	)	
George Tenet, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF STEVEN MACPHERSON WATT IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I, Steven Macpherson Watt, under penalty of perjury, declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am a human rights adviser to the American Civil Liberties Union. I submit this declaration in support of Plaintiff Khaled El-Masri's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment.

2. Specifically, I submit this declaration to demonstrate the significant number of documents in the public domain regarding the Central Intelligence Agency's rendition program, and Mr. El-Masri's rendition in particular. These documents comprise,

inter alia, official unclassified U.S. government documents detailing the program, public statements by U.S. government officials describing in detail the parameters of the program, and documentation from international inter-governmental and national parliamentary inquiries and criminal investigations into European states' involvement in the U.S. rendition program. In addition, since Mr. El-Masri went public with his allegations, more than 300 articles in major newspapers have described his case, as have numerous U.S. and international television documentary programs. The documentation referenced in this declaration represents just a fraction of an extensive and growing number of documents describing the U.S. rendition program that are currently publicly available.

3. Since September 11, 2001, senior officials within the U.S. government, including senior intelligence officials, have spoken publicly about the rendition program.

4. On departing for Germany on an official state visit the day before this action was commenced, Secretary of State Condoleezza Rice defended the rendition program as "a vital tool in combating transnational terrorism." She explained that the United States "must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law." She continued: "For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." The U.S., she said, did not "have the luxury of only using law enforcement techniques," but required other options when it was unable to

"prosecute someone that is a known terrorist or a suspected terrorist...." She added:

> In some situations, a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make a sovereign choice to cooperate in a rendition.

Secretary Rice denied that individuals were rendered to permit coercive interrogation techniques: "The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured." Secretary Rice explained that persons detained by the United States may "be held for an extended period if the intelligence or other evidence against them has been carefully evaluated and supports a determination that detention is lawful." She confirmed that foreign governments play a role in the process: "Some governments choose to cooperate with the United States in its intelligence, law enforcement, or military matters," and in return for their cooperation, the United States shares intelligence it gathers. Attached hereto as Exhibit A is a true and correct copy of Secretary of State Condolcezza Rice's *Remarks Upon Her Departure for Europe,* Andrews Air Force Base, (Dec. 5, 2005) transcript *available at* http://www.state.gov/secretary/rm/2005/57602.htm.

5. In a press briefing the following day, Secretary Rice and German Chancellor Merkel fielded questions on renditions in general and on Mr. El-

Masri's alleged rendition in particular. In relation to El-Masri's case, Secretary Rice stated:

> When and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify those mistakes. I believe that this will be handled in the proper courts here in Germany and if necessary in American courts as well.

Attached hereto as Exhibit B is a true and correct copy of the *Joint Press Briefing by Condoleezza Rice and Angela Merkel*, (Dec. 6, 2005) transcript *available at* http://www.state.gov/secretary/rm/2005/57672.htm.

6. Chancellor Merkel later confirmed that she and Secretary Rice had spoken specifically about Mr. El-Masri's case, and related that "the American Government, the American Administration, has admitted that this man had been erroneously taken and that as such the American Administration is not denying that it has taken place." *Id.*

7. On the same day, in Washington D.C., White House Press Secretary Scott McClellan, citing Secretary Rice's comments, reiterated that the United States has long engaged in renditions of terror suspects, and denied that those suspects were tortured. Attached hereto as Exhibit C is a true and correct copy of the *Press Briefing by Scott McClellan*, (Dec. 6, 2005) transcript *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051206-3.html.

8. During a public meeting in Australia, Secretary Rice confirmed that "the practice of rendition is

something that's been practiced way before September 11th when extradition isn't an option because sometimes you have to take people off the streets." Attached hereto as Exhibit D is a true and correct copy of Secretary of State Condoleezza Rice's *Remarks at Town Hall Meeting with University of Sydney Students,* (March 16, 2006) transcript *available at* http://www.noticias.info/asp/aspComunicados.asp?nid=156045&src=0.

9. During the 9/11 Commission of Inquiry, intelligence officials, including defendant Tenet, gave both written and oral testimony on the program. Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the U.S. State Department's Bureau of Intelligence and Research, described the CIA's role in liaising with foreign government intelligence agencies to effect renditions, stating that the Agency "plays an active role, sometimes calling upon the support of other [government] agencies for logistical or transportation assistance" but remaining the "main player" in the process. Attached hereto as Exhibit E is a true and correct copy of *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States,* (March 24, 2004) (statement by Christopher Kojm, Deputy Executive Director, National Commission on Terrorist Attacks Upon the United States, and former Deputy Assistant Secretary of State), transcript *available at* http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf.

10. In a written statement submitted to the 9/11 Joint Inquiry Committee, defendant Tenet described

the CIA's role in pre-September 11 renditions. He explained that:

> During the Millennium threat period . . . [o]ver a period of months, there was close, daily consultation that included Director Freeh, the National Security Adviser, and the Attorney General. We identified 36 additional terrorist agents at the time around the world. We pursued operations against them in 50 countries. Our disruption activities succeeded against 21 of these individuals, and included arrests, renditions, detentions, surveillance, and direct approaches.

The CIA, he explained, worked "with numerous European governments, such as the Italians, Germans, French, and British," and "[by] 11 September, the CIA (in many cases with the FBI) had rendered 70 terrorists to justice around the world." Attached hereto as Exhibit F is a true and correct copy of *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee,* (October 17, 2002) *available at* http://www.cia.gov/cia/public_affairs/speeches/2002/dci_testimony_10172002.html.

11. In the written statement he submitted to the 9/11 Commission of Inquiry, defendant Tenet elaborated upon a number of specific instances of CIA involvement in renditions, including assisting "another foreign partner in the rendition of a senior Bin Laden associate" and assisting the Jordanian government in "render[ing] to justice" "terrorist cells that planned to attack religious sites and tourist hotels." Attached hereto as Exhibit G is a true and correct copy of *Written Statement for the Record of the Director of Central Intelligence Before the*

National Commission on Terrorist Attacks Upon the United States, (March 24, 2004) *available at* http://www.9-11commission.gov/hearings/hearing8/tenet_statement.pdf.

12. Based upon the testimony taken and written statements received, the 9/11 Commission staff developed initial findings that they later made available to the public. Under the heading "Rendition," these findings reveal that officials of the CIA, FBI, State Department, and foreign governments cooperated in the rendition of suspected terrorists. Specifically, they conclude that "the CIA helps to catch and send [the suspect] to the United States or a third country," and that renditions were "an important component of U.S. counterterrorism policy throughout the period leading up to 9/11" and "are still widely used today." Attached hereto as Exhibit H is a true and correct copy of *Staff Statement No. 7, National Commission on Terrorist Attacks Upon the United States, available at* http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf.

13. Current CIA Director Porter Goss has testified about the rendition program in an open session of the Senate Armed Services Committee. In response to Senator Kennedy's questions about the existence of the rendition program and the transfer of terrorist suspects by the CIA, Director Goss stated:

> [O]n the subject of transferring dangerous terrorists and how that all comes about, there are obviously a number of equities involved. We have liaison sources, we have our other government agencies. The idea of moving people around, transferring people for criminal or other reasons, by

> government agencies is not new. For us in the intelligence business, the idea of helping out dealing with terrorists has been around for about 20 years. And we do have policies and programs on how to do it. We also have liaison partners who make requests of us, and we try to respect not only the sovereign rights of other countries, but all of the conventions and our own laws and, of course, the Constitution. And as far as I know, we do that.

Attached hereto as Exhibit I is a true and correct copy of *Threats to U.S. National Security: Hearing of the Senate Armed Services Committee*, 109th Cong. 4, (March 17, 2005) (Responses to Senators McCain and Kennedy), transcript *available at* http://www.humanrightsfirst.org/us_law/etn/docs/fedwires125g.htm.

14. Former senior CIA operatives have spoken openly and in detail about the rendition program. Michael Scheuer, a 22-year veteran of the CIA and Chief of the Bin Laden Unit at the Counterterrorist Center from 1996 to 1999, was an architect of the rendition program. Scheuer has described the program's origins and its current manifestation: "The direction [from the politicians] was find, apprehend and hold senior members of Al Qaeda and try to find out what they know about coming attacks against the United States." He said also that, presently, "the U.S. government is willing to hold these people at various incarceration sites around the world." Attached hereto as Exhibit J are true and correct copies of *Interview of Michael Scheuer*, PBS Frontline, (Oct. 18, 2005) *available at* http://www.pbs.org/wgbh/pages/frontline/torture/interviews/scheuer.html, and Michael Scheuer, *A Fine*

Rendition, NEW YORK TIMES, (March 11, 2005), at A23, (explaining that "[r]enditions were called for, authorized and legally vetted not just by the N.S.C. and the Justice Department, but also by the presidents – both Mr. Clinton and George W. Bush," and "if mistakes were made, like the alleged cases of innocent detainees, they should be corrected . . . .").

15. Robert Baer, a former covert officer for the CIA who left the agency after 21 years, has confirmed that one goal of the rendition program is to employ harsher interrogation tactics: "If you send a prisoner to Jordan you get a better interrogation. If you send a prisoner, for instance, to Egypt you will probably never see him again, the same way with Syria." Attached hereto as Exhibit K is a true and correct copy of *Transcript of "File on Four" – Rendition,* BBC, (Feb. 8, 2005) *available at* http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15_02_05_renditions.pdf.

16. Members of Congress have publicly debated the parameters of the rendition program and proposed concrete legislative measures for its reform. In response to a letter from Senator Leahy expressing concerns about rendition and its failure to comport with U.S. obligations under the Convention Against Torture, William J. Haynes II, General Counsel of the Department of Defense wrote: "Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country." Attached hereto as Exhibit L is a true and correct copy of the *Letter from William J. Haynes II to Senator Patrick Leahy*, (June 25, 2003) *available at* http://hrw.org/press/2003/06/letter-to-leahy.pdf.

17. Senator Leahy has introduced legislation to address the rendition of any individual by the United States to another country. Attached hereto as Exhibit M is a true and correct copy of *Convention Against Torture Implementation Act 2005* (S. 654), 109th Congress, (2005) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s654is.txt.pdf. Representative Markey has introduced similar legislation in the House. Attached hereto as Exhibit N is a true and correct copy of *Torture Outsourcing Prevention Act* (H.R. 952), 109th Congress, (February 17, 2005) *available at* http://www.theorator.com/bills109/hr952.html. In introducing the bill, Representative Markey stated: "Under the name 'extraordinary rendition,' the CIA reportedly sends terrorism suspects, sometimes on the flimsiest of evidence, to foreign countries that are known to employ torture in prisoner interrogation...." Attached hereto as Exhibit O is a true and correct copy of Representative Edward Markey's Comments, *Introduction of Legislation Prohibiting Extraordinary Rendition*, House of Representatives, (June 23, 2004) *available at* www.fas.org/irp/congress/2004_cr/rendition.html.

18. The interest of members of Congress in the rendition program has also prompted a report from the Congressional Research Services that comprehensively details the history of the program, its current parameters, and the legal constraints on its use under domestic and international law. Attached hereto as Exhibit P is a true and correct copy of Congressional Research Services Report for Congress, R*enditions and Constraints Imposed by Laws on Torture*, (September 22, 2005) *available at* http://www.fas.org/sgp/crs/natsec/RL32890.pdf.

19. International Human Rights organizations in numerous reports have documented the existence of the program and cited in detail to many examples of its use around the world. Attached hereto as Exhibits Q are true and correct copies of Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture,* (April 2004) *available at* http://www.hrw.org/reports/2004/un0404/ (documenting specific rendition cases and discussing use and efficacy of "diplomatic assurances" in the process); Amnesty International, USA/Yemen, *Secret Detention in CIA "Black Sites,"* (November 8, 2005) *available at* http://web.amnesty.org/library/pdf/AMR511772005ENGLISH/$File/AMR5117705.pdf (documenting U.S. and Yemeni governments involvement in renditions); Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture By Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* (2004) *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf (documenting U.S. involvement in numerous renditions, including Mr. El-Masri's, and setting forth applicable legal framework); and Amnesty International, USA, *Below the Radar: Secret Flights to Torture and Disappearance,* (April 5, 2006) *available at* http://web.amnesty.org/library/Index/ENGAMR510512006 (describing use of privately owned aircraft in U.S. rendition program and specifically in Mr. El-Masri's case; documenting recent interview between Amnesty International researcher in Yemen and Walid al-Qadasi, a Yemeni national detained in Kabul by U.S. authorities in 2002, then at Guantánamo Bay, before being transferred to custody in Yemen, who identified Mr. El-Masri's sketch plan of the prison

facility [Exh. F to Declaration of Khaled El-Masri] as the same facility in which he was held by U.S. authorities in 2002).

20. Concern among European nations about complicity in the rendition program through the operation of U.S.-run detention centers in certain European countries and the use of European airspace and airports by the CIA to facilitate the program has resulted in inter-governmental inquiries by the Council of Europe and European Parliament, as well as separate criminal investigations and public inquiries in 18 countries, including, *inter alia,* France, Italy, Spain, Sweden, United Kingdom, and Germany. Attached hereto as Exhibits R are true and correct copies of the following documents:

i) Council of Europe's Parliamentary Assembly Committee on Legal Affairs and Human Rights (Rapporteur Dick Marty), *Report On Alleged Secret Detentions In Council Of Europe Member States,* (January 22, 2006) *available at* http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf

ii) European Parliament, TDIP Temporary Committee, *Working Document of Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,* (February 14, 2006) *available at* http://www.europarl.eu.int/meetdocs/2004_2009/documents/dt/580/580259/580259en.pdf;

iii) Craig Whitlock, *Europeans Probe Secret CIA Flights: Questions Surround Possible Illegal Transfer of Terrorism*

Suspects, WASHINGTON POST, (November 17, 2005), at A22, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602198.html (reporting that officials in Spain, Sweden, Norway and European Parliament had opened formal inquiries or demanded answers from U.S. officials about CIA rendition flights within their respective jurisdictions);

iv) Eric Decouty, *La France Enquete Sur Les Avions de la CIA*, LE FIGARO (France), (March 2, 2006) *available at* http://www.lefigaro.fr/france/20060302.FIG000000200_la_france_enquete_sur_les_avions_de_la_cia.html (reporting that Attorney General for Bobigny had opened criminal investigation into use of Bobingy airport by CIA for rendition flights);

v) Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan: Italy Allegedly Misled on Cleric's Abduction*, WASHINGTON POST, (Dec. 6, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400885.html (reporting that prosecutors and judges in Milan have issued arrest warrants charging 22 alleged CIA operatives, including head of CIA Milan substation, with kidnapping and other crimes);

vi) Giles Tremlett, *Spanish Police Expose More CIA Links To Secret Flights Of Detainees*, THE GUARDIAN, (Nov. 15, 2005), at 18, *available at*

http://www.guardian.co.uk/spain/article/0,,1642828,00.html (reporting that Spanish police have traced up to 42 suspected CIA operatives believed to have taken part in secret flights carrying detained or kidnapped Islamic terror suspects to interrogation centers and jails in Afghanistan, Egypt, and elsewhere);

vii) Craig Whitlock, *New Swedish Documents Illuminate CIA Action: Probe Finds 'Rendition' Of Terror Suspects Illegal*, WASHINGTON POST, (May 21, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/20/AR2005052001605_pf.html (reporting on ten-month investigation into rendition of two Egyptian asylum seekers);

viii) Office Of The Swedish Parliamentary Ombudsman, *A Review Of The Enforcement By The Security Police Of A Government Decision To Expel Two Egyptian Citizens*, (March 22, 2005), *available at* http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX_SFS_Decision&Id=1662 (finding that Swedish security police cooperated with U.S. agents in rendition of two Egyptian asylum seekers to Egypt, where there was strong likelihood of torture);

ix) Richard Norton-Taylor and Ian Cobain, *MPs recall Straw as air traffic controllers confirm 200 CIA flights*, THE GUARDIAN, (February 23, 2006), at 5, *available at*

http://www.guardian.co.uk/usa/story/0,,1715866,00.html (reporting on initiation of U.K. Parliamentary Inquiry into rendition flights);

x) *German spy probe to include CIA "kidnap," flights,* REUTERS, (March 10, 2006) *available at* http://today.reuters.com/news/newsArticle.aspx?type=worldNews&storyID=2006-03-10T150911Z_01_L10531306_RTRUKOC_0_US-GERMANY-USA-SPIES.xml&archived=False (reporting on commencement of German parliamentary inquiry into alleged kidnapping of Khaled El-Masri by CIA).

21. The United Nations has also examined the U.S. rendition program and is conducting further investigations into its implementation. The U.N. Committee Against Torture (CAT) has considered two cases relating to the rendition of two Egyptian asylum seekers from Sweden to Egypt on December 18, 2001. In the course of its deliberations, the CAT considered evidence of CIA involvement produced by the parties. In one of the cases, the CAT found Sweden in violation of article 3 (prohibition against rendition to torture) of the U.N. Convention Against Torture. Attached hereto as Exhibit S is a true and correct copy of the Decision of the CAT in *Agiza v. Sweden*, CAT/C/34/D/233/2003, (May 20, 2005) *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4dec90a558d30573c1257020005225b9?Opendocument.

22. In addition, on August 30, 2005, the U.N. Special Rapporteur on Torture submitted a report to the U.N. General Assembly that includes an analysis of specific rendition cases and U.S. involvement therein. The report concludes that the renditions

violated key provisions of the Convention Against Torture. Attached hereto as Exhibit T is a true and correct copy of the *Report of the U.N Special Rapporteur on Torture to the U.N. General Assembly*, (August 30, 2005) *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/476/51/PDF/N0547651.pdf?OpenElement.

23. A Commission of Inquiry has been convened in Canada following the rendition of a Canadian citizen, Maher Arar, by U.S. officials to detention and interrogation in Syria. Public hearings commenced in May 2005. The Inquiry has resulted in the production of numerous official documents linking the decision to remove Mr. Arar to Syria to the United States. Attached hereto as Exhibit U is a true and correct copy of *Terms of Reference for the Public Inquiry into the Maher Arar Matter*, (February 5, 2004) *available at* http://www.ararcommission.ca/eng/Terms_of_Reference.pdf.

24. In August 2005, a legal memorandum drafted by the FBI analyzing interrogation techniques in place at Guantánamo became publicly available. The memorandum includes a legal analysis of rendition as one of four interrogation techniques employed on detainees at Guantánamo, and notes that one of the techniques contemplates the transfer of detainees from Guantánamo, "either temporarily or permanently, to Jordan, Egypt or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information." Attached hereto as Exhibit V are true and correct copies of Federal Bureau of Investigation, *Memorandum on Legal Analysis of Interrogation Techniques,* (November 27, 2002), and Michael Isikoff, *Exclusive: Secret Memo –*

Send to Be Tortured, NEWSWEEK, (August 8, 2005), at 7, *available at* http://msnbc.msn.com/id/8769416/site/newsweek/?rf=technorati (quoting unnamed senior U.S. law-enforcement official familiar who stated that "the memo reflects concerns among many agents and lawyers about 'rendition.'").

25. According to media reports, the Inspector General of the CIA is conducting an investigation of the rendition program and specific instances of mistakes that have been made in relation to its implementation. Attached hereto as Exhibit W is a true and correct copy of *CIA Watchdog Looks into 'Erroneous Renditions': Inspector general investigates cases of people mistaken as terror suspects*, ASSOCIATED PRESS, (December 27, 2005) *available at* http://www.msnbc.msn.com/id/10618427/ (citing current intelligence official and reporting that CIA's inspector general is investigating fewer than 10 cases of potentially "erroneous renditions").

26. Media reports on the rendition program generally, and Mr. El-Masri's rendition specifically, are too numerous to assemble. A Westlaw search confined to "El-Masri and rendition" in the period January, 2005 to April, 2006, revealed 297 news articles in that database alone. These articles have appeared on the front pages of the Washington Post, New York Times, and Los Angeles Times, and have been prominently featured in The New Yorker, Newsweek, and other major publications around the world. Mr. El-Masri's case has been featured on CBS' 60 Minutes, PBS Frontline, Dateline NBC, and ABC news. Attached hereto as Exhibits X are true and correct copies of the following newspaper articles and television documentary transcripts:

i) Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Prisons*, WASHINGTON POST, (December 26, 2002), at A1, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A37943-2002Dec25?language=printer (interviewing U.S. officials involved in renditions and quoting one official as saying: "We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.");

ii) Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, NEW YORK TIMES, (January 9, 2005), at 11, *available at* http://www.nytimes.com/2005/01/09/international/europe/09kidnap.html?ex=1263013200&en=f9446887460b5463&ei=5088&partner=rssnyt (first comprehensive account of Mr. El-Masri's story in U.S., describing his rendition and alleged involvement of CIA);

iii) Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, (February 14 and 21, 2005) *available at* http://www.newyorker.com/printables/fact/050214fa_fact6 (providing comprehensive accounting of rendition program from its initial inception to present);

iv) Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, NEWSWEEK,

(February 28, 2005) *available at* http://www.msnbc.msn.com/id/6999272/site/newsweek/ (describing Mr. El-Masri's rendition and CIA's broader rendition program);

v) Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, NEW YORK TIMES, (March 6, 2005), at 11, *available at* http://www.nytimes.com/2005/03/06/politics/06intel.html?ex=1267851600&en=716eddf5c82d9367&ei=5088&partner=rssnyt (explaining that current rendition program was authorized by President George W. Bush six days after September 11, 2001);

vi) *CIA Flying Suspects to Torture?*, 60 MINUTES (CBS television broadcast), (March 6, 2005) transcript *available at* http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml) (discussing rendition program and Mr. El-Masri's case, and describing U.S. modus operandi: "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away.");

vii) Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTON POST, (November 2, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html (describing establishment of network of CIA-run "black site" detention facilities worldwide; explaining that prisoners held within covert system were divided into two tiers: (1) major terrorism

suspects, held at black sites; and (2) prisoners with limited intelligence value, who are transferred to custody of foreign governments);

viii) Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA mistake*, WASHINGTON POST, (December 4, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html (describing in detail the decision-making process during Mr. El-Masri's rendition, including internal CIA discussions and role of German and Macedonian governments).

27. Much information about the role of private airline corporations in the rendition program has been uncovered by investigative journalists. Information is now widely available online identifying the role of particular corporations and aircraft in the renditions of specific individuals, including Mr. El-Masri. Attached hereto as Exhibits Y are true and correct copies of the following documents:

i) Photographs of N4476S (formerly N313P), *available at* http://www.airliners.net/search/photo.search?cnsearch=33010/1037&distinct_entry=true;

ii) Federal Aviation Administration Registry for N4476S (formerly N313P), *available at* http://registry.faa.gov/aircraftinquiry/NNumSQL.asp?NNumbertxt=4476S&status=is+not+Assigned%2FReserved;

iii) Massachusetts State Registration Certificate for Premier Executive Transportation Services Registration

Certificate 521857292, *available at* http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=521857292;

iv) *The Broken Promise, Part I,* Kalla Fakta (television broadcast on Sweden's TV 4), (May 17, 2004) English transcript *available at* http://www.hrw.org/english/docs/2004/05/17/sweden8620.htm (discussing role played by aircraft with FAA registration number N379P and owned by defendant Premier Executive Transportation in rendition of two Egyptian asylum seekers from Sweden to Egypt in December, 2001);

v) Scott Shane, Stephen Grey, and Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, NEW YORK TIMES, (May 31, 2005), at A1, *available at* http://www.nytimes.com/2005/05/31/national/31planes.html?ei=5088&en=6007accb4801296c&ex=1275192000&adxnnl=1&partner=rssnyt&emc=rss&adxnnlx=1144156272-pU9RpnnBz4dTPcBFDgvzIw (discussing defendant Aero Contractors Limited's role in rendition program, and specifically Mr. El-Masri's rendition);

vi) A.C. Thompson and Trevor Paglen, *The CIA's Torture Taxi*, SAN FRANCISCO BAY GUARDIAN, (December 14-20, 2005), Vol. 40, No. 11, *available at* http://www.sfbg.com/40/11/cover_plane.html (describing institutional structure of defendant Keeler and Tate Management,

including its ownership of aircraft registered N4476S, based upon examination of publicly available company registration documents and annual returns);

vii) Dana Priest, *Jet Is an Open Secret in Terror War*, WASHINGTON POST, (Dec. 27, 2004), at A1, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A27826-2004Dec26?language=printer (discussing generally use of CIA "front companies" in rendition program);

viii) *Op. Cit.* Exh. Q, Amnesty International, *Below the Radar: Secret Flights to Torture and Disappearance*, (April 5, 2006) (describing rendition program and its support network of aircraft and airports and documenting over 1,000 flights linked to renditions based on several sources including, *inter alia*, FAA flight records; European flight records; actual flight logs; aircraft movements recorded by airport authorities and airport records acquired in police and parliamentary investigations).

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of April 2006.

s/Steven Macpherson Watt